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No. 15091

United States

Court of Appeals

for the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation, Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, Appellee.

Transcript of Record

(In Two Volumes)
VOLUME II.
(Pages 291 to 586, Inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —7-23-56

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RAYMOND C. SIMPSON

recalled as a witness on behalf of the defendant, having been previous duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

* * * * * [386]

Q. (By Mr. Gallagher): Mr. Simpson, do you recall the testimony given by Mr. John Hutchison which you read as part of plaintiff's case this morning, in which he said that on May 27, 1951, "We went aboard the Linfield Victory"?

A. I do.

Q. Do you recall that I asked you at that time whether you were the one who was talking to him and asking him the questions? A. I do.

Q. Now, did you go aboard the Linfield Victory with Mr. John Hutchison at that time?

A. Yes, I did. [387]

Mr. Simpson: The plaintiff rests, your Honor.

* * * * *

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

Mr. Gallagher: If your Honor please, the defendant respectfully moves the court for an order directing a verdict in favor of the defendant as to the first cause of action, upon the following grounds:

Number one, there is no evidence introduced by the plaintiff, direct or indirect, which would support a finding by the jury that Nathanael Patrick Hutch-

ison sustained either a fractured skull or a subdural hemorrhage in the course of his employment;

Number two, there is no evidence, direct or indirect, which would support a finding by the jury that any injury suffered by Nathanael Patrick Hutchison was proximately caused or proximately contributed to by any lack or omission on the part of the defendant to supply appliances in and about the ventilator shaft, to provide a reasonably safe place to work;

Number three, there is no evidence, direct or indirect, which would support a finding by the jury that at the precise time when Nathanael Patrick Hutchison sustained his fracture of the skull or sustained the injury to his brain, which resulted in the subdural hemorrhage, that the relationship of master and servant or employer and employee was in existence;

Number four, there is no evidence, direct or indirect, which would support a finding that at the precise time when Nathanael Patrick Hutchison suffered the fracture of the skull or the subdural hemorrhage he was acting in the course of his employment or in the performance of any duty pertaining to any employment, or in the doing of any matter or thing which was expressly or impliedly authorized by any contract of employment, or that he was doing anything which was reasonably incidental to anything required to be done by him in the actual course of employment;

Number five, upon the ground that to permit the jury to [393] render a verdict against the defend-

ant on the first cause of action would be to permit the jury to enter the realm of speculation with reference to questions of proximate cause, the question whether the relationship of employer and employee did or did not exist at the precise time of the sustaining of the injuries. And also speculation with respect to when any contract of employment terminated.

I call your Honor's attention in that respect to the averment in Paragraph VII of Plaintiff's amended complaint, first cause of action, as follows:

"That on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard said steamship as an able bodied seaman with deck maintenance duties."

And the answer of the defendant referrable to Paragraph VII, which is as follows:

"Answering the averments in Paragraph VII defendant admits that from 8:00 a.m. until approximately 12:30 p.m. on the 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS 'Linfield Victory' as an able bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing [394] deck maintenance duties or any deck maintenance duty.

"Except as hereinabove specifically admitted or alleged, denies the averments and each thereof in Paragraph VII."

We therefore have a consistent and direct issue

with reference to whether Nathanael Patrick Hutchison was an employee of the defendant at any time subsequent to 12:30 p.m. on April 24, 1951, and all the rest of the things they allege in that paragraph and which are not specifically admitted.

They have offered no evidence whatever in this case to show that Nathanael Patrick Hutchison was even on board the vessel on April 24, 1951, subsequent to the time he was observed by Kalnin coming out of the crew's mess hall, where he had evidently gone for a meal between 12:00 noon and 1:00 p.m.

There is no evidence in the case that anybody saw him anywhere on the vessel subsequent to that time. Therefore, there is no proof that on the 24th day of April he suffered any injury whatever.

There is no proof of the time when he suffered any injury, if he did, in fact, suffer one on April 24, 1951. There is no evidence whatever in this record with reference to anything that Nathanael Patrick Hutchison might or could have been doing on or about April 24, 1951, which would include back to the [395] time the vessel got to Baltimore and might continue on until the time the vessel left Baltimore. Not one word of testimony in here. So that those subjects are left entirely to speculation on the part of the jury.

Now, in the event that your Honor is influenced at all by the decision of the Supreme Court in the case of Lavender v. Kurn, which is cited in one of the plaintiff's proposed instructions.

Justice Murphy did say in that case that a meas-

ure of speculation and surmise is required whenever reasonable minds might differ with reference to the effect of uncontradicted evidence or which have conflicting evidence and may be true or reasonable inferences to be drawn or from uncontradicted evidence or conflicting evidence.

But in later cases the Supreme Court has reiterated the well established rule that speculation cannot take the place of probative facts. And if your Honor wants some more authority on that subject I will be very happy to give it to you.

I have cited the authority in support of defendant's proposed instructions. One particular case I have in mind is Moore v. The Chesapeake & Ohio Railroad Company in 85 Lawyers Edition, where the Supreme Court in a federal employer's liability case stated positively that speculation cannot do duty for probative facts.

Now, I appreciate the fact that your Honor is being [396] patient with me and I want you to bear with me a little more. Let's talk about Amundsen's deposition. That is part of their evidence.

Amundsen testified he saw Mr. Hutchison go toward the opening in the bulkhead down in the lower tween deck to get to the place where the ladder was, which went up the escape shaft. And he said he thought that was the last he saw of him.

However, on his further examination he said he couldn't be sure he didn't see him in the mess room during the noon hour.

Now, during the noon hour there is no work being done. There is no evidence here that there was any

duty to perform on the part of Nathanael Hutchison, no evidence that he had any reason whatsoever to go into the mast house, either go down the ladder or come up it during the noon hour.

Now, the only other testimony we have got is that of Mr. Kalnin, the only other direct testimony, and he said that Mr. Hutchison came up through that escape shaft ladder at about ten minutes to 12:00 and walked aft toward the crew's mess room.

My next ground is that, as a matter of law, the guard rails surrounding the ventilator shaft constituted a reasonably adequate safety appliance and was, as a matter of law, reasonably adequate to prevent any sober seaman in the full possession of his normal faculties from inadvertently falling [397] into or getting into the ventilator shaft.

My next ground is that the plaintiff has not offered evidence, direct or indirect, upon which the jury could find that the masthouse deck in the area around the ventilator shaft was a place of work. The most that can be said for the evidence is that the masthouse deck at its after portion and alongside the ladder, which goes down the escape shaft, were and each thereof was a means of getting to a place of work or, in other words, a passageway.

The only place of work mentioned in the evidence was down in the lower hold. I do not contend that the defendant was not required, as a general proposition—I am not speaking with reference to this case—but a ship owner is required to exercise reasonable care to furnish reasonably safe means of ingress to and egress from any place

where a seaman is required by the nature of his duties to perform actual work.

My next ground is that the plaintiff has failed to offer evidence, direct or indirect, which would support a finding that the defendant was guilty of actionable negligence in reference to any alleged neglect or failure to furnish—I would like to revise that—neglect or failure to supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

Now, as a separate proposition, if your Honor please, and [398] not directed particularly for a motion for a directed verdict, I move the court to exclude from the consideration of the jury, in any event, the issue raised by the averments in Paragraph IX of the first amended complaint as follows:

"That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, State of Pennsylvania."

Said averments and each of them being denied in the answer of the defendant. And there is no evidence showing that he was found six days after he was injured.

There is no evidence here, direct or indirect, showing that he was injured on April 24th or April 23rd or April 25th, or at any time on or about April

24th, or at any time of the day or night he might have been injured on any of those days.

And there is no evidence showing that as a proximate result of any failure to find him before he was found he suffered death or came to his death.

Now, if your Honor please, that would constitute the motion for a directed verdict as to the first cause of action and the separate motion to exclude the alleged issue raised [399] by the averments of Paragraph IX from the consideration of a jury, in any event.

Now, with reference to the second cause of action, the defendant also separately and distinctly moves the court for a directed verdict upon each and every ground hereinabove set forth in the motion for a directed verdict as to the first cause of action.

Now, I want to do one thing more. You Honor will recall that, insofar as personal injury is concerned, the statute provided that:

"Any seaman who shall suffer personal injury in the course of his employment may at his election maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply."

And the survival portion is found in the Federal Employers Liability Act, with which your Honor is well familiar.

Now, when we talk about statutes of the United States modifying or extending the common law

right or remedy, that language does not adopt all of the Federal Employers Liability Act or make all of the Federal Employers Liability Act applicable to a suit for damages by a seaman, who is injured in the course of his employment. [400]

It makes only those portions of the Federal Employers Liability Act, which actually modify or extend the theretofore existing common law right or remedy in cases of personal injury to railway employees immediately preceding the enactment of the Federal Employers Liability Act.

Now, what are those modifications? As applied to the pleadings in this case, the averments made by the plaintiff, her sole and only complaint of negligence, aside from what I have called your Honor's attention to, set forth in Paragraph XI of the first cause of action, is and must be predicated upon a contention that the defendant—pardon me, I would like to revise that.

That Nathanael Patrick Hutchison suffered personal injury in the cause of his employment and that he died as a result of such personal injury, and that such personal injury was caused or resulted, in whole or in part, by reason of an insufficiency due to the negligence of the defendant in and about its appliances in the masthouse.

I respectfully contend there is no substantial evidence here which would be sufficient to support a verdict in favor of the plaintiff, either with reference to the first cause of action or the second cause of action. And I again respectfully ask your Honor

to keep in mind the question of the relationship. Without that relationship being proved at the precise time of injury there is no possible basis for a cause of action because [401] of negligence or because they don't proceed under any Maryland alleged statute.

If they did contributory negligence would be a complete defense. They pin their entire case upon the Jones Act and an essential prerequisite to such a case going to a jury, regardless of all else, is evidence, direct or indirect, of the existence of the actual conventional relationship of employer and employee at the very time he suffers the injury which results in his death. There is no such evidence here.

The Court: What about the evidence on this matter of employer and employee relationship, Mr. Simpson?

Mr. Simpson: Your Honor, I would submit to the court there is certainly a fair inference from a number of factors.

One, that the ship's log shows concern regarding Hutchison as an employee, showing that he was reported missing on the 26th and an entry was made in the log at that time.

Secondly, that he was last seen by employees, that he was subsequently found dead aboard the ship.

To conclude, that he actually experienced those injuries during the scope of his employment.

Mr. Gallagher: The log, your Honor, shows he

was missing from noon time on the 24th. That is not entering him as an employee.

Mr. Simpson: The log's entry, your Honor, was made on the 26th. [402]

The Court: The only question I have is what establishes that he was an employee?

Mr. Simpson: I would submit, your Honor, that one of the decisions that Mr. Gallagher referred to, namely, the Lavender case, and said it was an old case——

Mr. Gallagher: I didn't say it was an old one.

Mr. Simpson: ——would aid us on that, because a more recent case is Rex v. Pacific Atlantic Steamship Co., dealing with a similar question, where you had the problem of determining something from circumstantial evidence, and the court there expressly made it clear it is completely proper for a jury to engage in a measure of reasonable speculation if they can infer from the evidence before them that something is a fair inference.

I don't see from the evidence that is before the court, which I need not repeat, how any conclusion would be reached, other than that this man actually was aboard this ship and that his employment was not voluntarily terminated.

Mr. Gallagher: Well, the evidence is without conflict he didn't show up at 1:00 o'clock to go to work, which was his duty, if he were an employee.

Mr. Simpson: The evidence also shows, your Honor, that this man was missing, that no effort was made to find him, and quite conceivably dur-

ing the time when he was actually paid by the defendant, paid up until 12:00 of that day, that the [403] injuries might quite reasonably be inferred by the jury to have occurred before that time, which would mean he was an employee.

The Court: The court does not at this time rule respecting the Paragraph IX issue. All other motions are denied.

Now, do you wish to answer Mr. Gallagher on that issue tendered by Paragraph IX of the amended complaint?

Mr. Simpson: Yes, your Honor.

Mr. Gallagher: I think that is the one that disavowed, at the present time.

The Court: They did what?

Mr. Gallagher: Disavowed any claim of a cause of action for damages for death, by reason of a failure to search for him at the pretrial hearing.

Mr. Simpson: I have no such recollection, your Honor, and I don't think it would be reasonable to conclude we would file an amended complaint which expressly includes a paragraph setting that out, if we had disavowed it before.

But with respect to the specific claim asserted by Mr. Gallagher's contention, as I understand it is primarily directed to the fact that in the particular paragraph it is alleged, that "in said injured condition until four days after said fall, to wit, on the 30th day of April, 1951," and that as a practical matter there is no evidence in the record to show that whatever injury he might have received did occur six [404] days before April 30th.

I would submit that it is only a reasonable inference that the man, having been last seen on that particular day, that unless something could be established to show that this man had, in fact, left the ship and come back several days later and fallen into that ventilator shaft, that it is quite reasonable for the jury and the court to say that the injuries complained of occurred on the 24th.

And I would submit, not by way of evidence, but by way of the report that Mr. Gallagher gave us of the defendant stating the date of injury to be the 24th, that while you can't say it is a positive thing, it basically is a reasonable inference. In fact, it is the most reasonable inference that can be drawn from all the evidence, in that trying to determine another date for the injury, in light of the evidence we have before us here, would seem to be just a little bit simple, rather than proceeding upon this.

The Court: Defendant's motion with respect to the issue tendered by Paragraph IX of the first amended complaint is denied.

Mr. Gallagher: I am not going to try to get involved in any more argument, but I want the record to show I do not agree with Mr. Simpson's analysis of my reasons for the motion I made with reference to Paragraph IX. [405]

My motion was made on the grounds as I stated the motion, and I do not concede that Mr. Simpson's analysis of it is either correct or even simply correct. [406]

* * * * *

(Whereupon, at 3:30 o'clock p.m. Friday, October 7, 1955, an adjournment was taken to Tuesday, October 11, 1955, at 10:00 o'clock a.m.)

Tuesday, October 11, 1955, 9:55 a.m.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: At the request of counsel for the defendant in Hutchison v. Pacific-Atlantic Steamship Co., the court now reconvenes in the absence of the jury.

What was overlooked, Mr. Gallagher?

Mr. Gallagher: Your Honor please, this has reference to Paragraph IX of the first cause of action and the first Amended Complaint, and also in the same Paragraph, adopted by reference thereto in the Second Cause of Action, that Paragraph reads as follows:

"That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, state of Pennsylvania."

Now, I move to dismiss that particular paragraph, if it is a cause of action, upon the following grounds:

No. 1, it does not aver facts sufficient to show that

the [411] plaintiff is entitled to relief;

No. 2, the cause of action, if any, for the survival part of this lawsuit is strictly statutory. The Jones Act adopts certain portions of the Federal Employer's Liability Act, and those portions are the parts which modify or extend the theretofore existing common law rights or remedies.

The defendant contends there is no legal duty imposed upon the defendant, pursuant to any part or portion of the Jones Act, or any part or portion of the Federal Employer's Liability Act adopted by reference thereto, to search for an injured seaman. And that the only possible cause of action would be one which might be referrable to the claim for damages by reason of death.

In other words, if the master of the vessel knew that the man was injured and if the master of the vessel failed to exercise ordinary care to provide any and all reasonably required medical care and the man died, as a result of a negligent failure of the master to do that, then there might be facts sufficient to go to a jury with reference to that particular count.

In this case there is no evidence, direct or indirect, as to how long it would have required at Baltimore, Maryland, to get:

1, an ambulance to the place where the vessel was moored to the dock, or the distance between the nearest available [412] ambulance and the dock or the time it would have taken for the ambulance to get from wherever it was to the dock;

2, the time it would have required to get Mr.

Hutchison from the ventilator shaft to an ambulance;

3, the time it would take for an ambulance to get him to a hospital, actually having adequate and available operating room facilities;

4, that there was at the time a competent surgeon qualified to perform an operation and available for that purpose;

5, that at the precise time when such operation could have been commenced Nathanael Hutchison was still alive;

6, that the then effects of the fracture of the skull and subdural hemorrhage were not such as to have reached a point where an operation would be useless;

7, that at the end of such period of time, from the instant of injury to the precise time when a surgeon could have commenced an operation, Hutchison was actually alive and in such physical condition as to have made it reasonably probable that the operation would have saved his life;

8, there is no evidence, direct or indirect, that any employee of defendants, acting in the course of his employment, was guilty of negligence which proximately caused or proximately contributed to a failure to find Nathanael Patrick Hutchison between the time of injury and the time of death;

9, that any employee of defendant, acting in the course [413] of his employment, knew or should, in the exercise of ordinary care, have known that Nathanael Patrick Hutchison was actually at the

bottom of the ventilator shaft at any time when his death would have been avoided by taking all steps and doing all things which an ordinarily prudent person would have taken or done in an effort to save his life;

10, no legal duty was imposed upon the defendant, pursuant to the Jones Act or pursuant to any part of the Federal Employer's Liability Act, included within the Jones Act, to conduct any search for a seaman who fails to show up at the time fixed for resuming work or at any time while the vessel is tied to a dock. The only duty imposed by law is that when the master of a vessel knows or at most in the exercise of ordinary care should know that a seaman has actually sustained an injury requiring medical care and that such injury was sustained in the service of the ship, it then becomes his duty to exercise ordinary care in an effort to procure all reasonably necessary means of medical care for the benefit of such injured seaman.

An actual and negligent failure to perform this duty imposed by the general maritime law results in liability and damages to an injured and living seaman for any aggravation of the original injuries proximately resulting from such negligence on the part of the master, but the general maritime law does not, your Honor, furnish a remedy to anyone for [414] death of a seaman from any cause.

The first cause of action, if there is one, is exclusively statutory and is restricted to a recovery for conscious pain and suffering, if any.

A failure to search for an injured seaman would

not proximately cause conscious pain or suffering, in any event.

There is no——

The Court: Limit yourself, Mr. Gallagher, to stating your motion. Don't argue it.

Mr. Gallagher: Very well. My motion is threefold.

The Court: I have heard your motion, unless there is some additional motion. I specifically asked you Friday when we sent the jury home, after having used it only 20 minutes, we came to midafternoon and you finished, I specifically asked you to finish all your motions then.

This motion is not timely made.

Is there anything further to the motion?

Mr. Gallagher: Only that I want to make sure I am moving for a directed verdict with reference to these matters contained in Paragraph IX upon all of the grounds heretofore stated.

The Court: There can be no doubt but that you have made that motion. It is denied. [415]

* * * * *

The Court: Bring in the jury.

For your information, counsel, the court will reject plaintiff's offered Instructions Nos. 6, 8, 9, 11, 12, 15, 17, 22, 23, 24, 25, 26, 27, and 30.

The court's present intention is to give defendant's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 17, 20, 21, 22, 25, 26, 27, 28, 29, 33, 37, 38, 45, 48, 54, 56, 61, 62, and 63. Those of the plaintiff's which I have not said were rejected will be given, and those of the defendant, which I have not said would be given are rejected.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. Gallagher: Captain Dyer, will you take the stand, please?

HENRY C. DYER

called as witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated?

Your full name, sir? [474]

The Witness: Henry C. Dyer.

Direct Examination

Q. (By Mr. Gallagher): Where do you live?

A. 2967 Northwest Raleigh Street, Portland, Oregon.

Q. Are you employed by the defendant Pacific-Atlantic Steamship Co.?

A. I am marine superintendent.

Q. In your capacity as marine superintendent, will you tell us what you have charge of, in so far as the operation of vessels may be concerned?

A. Managing, storing, repairing and general navigation.

Q. Are you a master mariner? A. I am.

Q. For how long have you been fully licensed as a master mariner?

A. I believe it is 1926.

Q. Captain, are there any limitations on your license, with reference to either tonnage or oceans?

A. No.

(Testimony of Henry C. Dyer.)

Q. And that is what is called an unlimited master's license? A. Yes, unlimited. [475]

* * * * *

Q. (By Mr. Gallagher): Captain, are you familiar with the steamship Linfield Victory, or, were you, in 1951? A. Yes, sir.

Q. And do you know whether or not that vessel was owned by the United States of America, Department of Commerce, Maritime Administration?

A. It was.

Q. Do you know whether or not it was bare boat chartered to Pacific-Atlantic Steamship Co., including the period of the month of April, 1951?

A. It was, yes.

Q. Do you know whether or not that vessel instituted an intercoastal voyage on or about the 10th of March 1951, at Portland, Oregon?

A. I don't recall the date, but it was—she was in that regular trade.

Q. Do you know whether or not it was in the process or course of an intercoastal voyage at the time when it was in Baltimore, Maryland, in the month of April 1951? A. Yes, sir.

Q. Do you know whether or not that voyage ended at a [477] Pacific Coast port subsequent to the time it had been to the port of Baltimore, Maryland? A. Yes, sir.

Q. Now, in cases of that kind, are shipping articles required to be signed by the master and all members of the crew who are members of the crew for such a voyage? A. They are.

(Testimony of Henry C. Dyer.)

Q. In the course of your duties as marine superintendent, do accurate and certified copies of such shipping orders come to your attention and come to your desk? A. Yes, they do.

Q. I hand you a photostatic copy of shipping articles and ask you whether that document you have in your hand is a photostatic copy of regular intercoastal shipping articles involving the period I have mentioned?

A. Yes, sir, these articles are opened in Portland on the 10th of March 1951.

Q. When were they closed?

A. May 28, 1951, San Francisco.

Q. At a Pacific Coast port?

A. San Francisco.

Mr. Gallagher: I will offer the shipping articles as Defendant's Exhibit C.

The Court: The court will hold ruling in abeyance until counsel has had an opportunity to read them. [478]

If you can proceed to something else, do so, because those appear to be quite extensive and the print to be very small.

Mr. Gallagher: I might state to your Honor that the shipping articles are required to be in statutory form, and if it would aid counsel, he can see that statutory form in Volume 46, United States Code. It is printed in quite large type.

The Court: What is the number of the exhibit, so far as it has been marked for identification?

The Clerk: It will be Defendant's C.

(Testimony of Henry C. Dyer.)

The Court: Mark it as Defendant's C for identification, and we will rule on it after the recess.

(The document referred to was marked Defendant's Exhibit C for identification.)

Q. (By Mr. Gallagher): Captain Dyer, calling your attention to Plaintiff's Exhibit 4, a photograph, I direct your attention to this object which appears in the lower right-hand corner of the space just inside the open locker door, and ask you if you can tell what that object is.

A. That is a portable cargo light.

Q. Now, I call your attention to Plaintiff's Exhibit No. 7, a photograph, and to the object immediately below the arrow, identified as "E.O." Do you know what that is?

A. That is a marine outlet. It is an outlet for an [479] electric current for plugging in lights.

Q. In the event it is dark anyplace in a hold or in a masthouse, can a cargo light be used for the purpose of supplying artificial illumination?

A. That is their purpose.

Q. Is it the right of any member of the crew to take such a light and use it in case he desires to do so?

A. Yes. We have no restrictions on their use of the lights.

Q. Now, Captain, in the course of your duties as marine superintendent, did you have occasion to observe requisitions which might be made by the licensed officers of the vessel, in respect to equipment needed to bring up the ship's equipment to the

(Testimony of Henry C. Dyer.)

normal number of any particular article which might be carried on board?

A. I scrutinize and approve all deck department requisitions personally.

Q. Are those records part of the regular business records kept and maintained by Pacific-Atlantic Steamship Co.? A. They are.

Mr. Gallagher: In an effort to avoid encumbering the record, if your Honor please, and if counsel has no objection, I will just refer to that one item.

Mr. Simpson: No objection. I think it should be marked. [480]

Mr. Gallagher: I will have it marked, then.

Q. (By Mr. Gallagher): Captain, I show you Requisition No. 1, dated March 9, 1951, and direct your attention to this particular item here under the words "on hand," and particularly with reference to the SS. Linfield Victory.

How many cargo lights were on hand on the vessel on that date? A. Twenty-two.

Q. Were any additional ordered?

A. They ordered four.

Mr. Gallagher: Now, I will offer that in evidence, if your Honor please, as defendant's exhibit next in order, D.

The Court: Received.

(The document referred to was received in evidence and marked Defendant's Exhibit D.)

Q. (By Mr. Gallagher): Now, Captain, in the regular course of business, did the company procure

(Testimony of Henry C. Dyer.)

receipts from the master and chief mate of various articles delivered, as a result of requisitions?

A. Yes, they send in a copy of the purchase order and the vessel receipts, to show the delivery of those——

Q. Can you talk a little louder?

A. They send in a copy of the purchase order, send this to the ship and it is receipted for by the department head and the master, as being delivered. [481]

Q. And according to that, was that one of the regular business records of the company?

A. Yes.

Q. Does that show that these four lights, which are referred to in the requisition, were delivered to the vessel before the commencment of that voyage?

A. Those "4 only Lights, Cargo w/cable, Mogul Base."

Q. That is the same device referred to in the requisition? A. Yes.

Mr. Gallagher: I will offer that as Defendant's Exhibit E.

The Court: Received.

(The document referred to was received in evidence and marked Defendant's Exhibit E.)

Q. (By Mr. Gallagher): Now, Captain, have you been in masthouse No. 2 of the SS. Linfield Victory? A. Yes, sir.

Q. And have you been in the masthouse No. 2 of other Victory ships in addition to Linfield Victory? A. Many of them.

(Testimony of Henry C. Dyer.)

Q. How many ships did the Pacific-Atlantic Steamship Co. handle, in so far as shoreside business was concerned, for the United States Government?

A. I think we operated—we have operated, I think, [482] 37, 36 or 37 Victory type vessels, besides the six that we purchased outright.

Q. The ones you didn't purchase outright, did you operate one or more of them under a bare boat charter?

A. Yes, we had. I don't recall the number, but we had five or six under bare boat charter; more than that, probably.

Q. In so far as the others were concerned, were those operated by the Government under this G A agreement?

A. Yes, we had a general agency agreement for operation for the Government.

Q. And in those cases, where the Government retained the right to operate the ship and your company acted merely as general agent, did you go aboard any of those ships?

A. Oh, yes, I visited them frequently.

Q. Have you been present at any time while coastguard inspectors were inspecting Victory ships? A. Quite frequently.

Q. And was that done in Portland?

A. Sometimes in Portland; sometimes Seattle.

Q. Have you seen it done both places?

A. Both places.

Q. Now, in the course of the inspections made

(Testimony of Henry C. Dyer.)

by the coastguard inspectors, do they go into these masthouses?

A. Their inspection includes the entire vessel.

Q. Does that—— [483]

A. In all cargo spaces and masthouses and—with the exception of the tanks.

Q. When you say "tanks"——

A. I mean the double-bottomed tanks or fuel oil tanks.

Q. Those aren't in the masthouse?

A. No, no.

Q. Now, Captain, in all of the Victory ships that you have seen, have you seen any with No. 2 masthouses, which were any different than the No. 2 masthouse as shown in these photographs taken of the Linfield Victory? A. No, I haven't.

Q. Now, with reference to these shafts, Captain, you see this picture here, Plaintiff's No. 1, where there is a plate which goes across the top of the sheet of steel, which separates these two shafts (indicating)? A. Yes.

Q. Now, you also see in these photographs, this picture No. 10, which shows a view down the ventilator shaft in No. 2 masthouse? A. Yes.

Q. Now, with reference to this screen down here at the bottom of that shaft, can you tell us what is on the other side of that screen? In other words, where does it lead to? A. The lower hold.

Q. In which hold? [484]

A. This would be No. 2 lower hold.

Q. No. 2 lower hold. Then that would be the

(Testimony of Henry C. Dyer.)

hold which is covered by the hatch covers immediately forward of the masthouse, as shown in Plaintiff's Exhibits 7 and 8?

A. That is right.

Q. This one here (indicating). Now, Captain, if a man were conscious and in the possession of his powers of perception and he shouted or yelled at that screen or into that screen, is there anything to obstruct the sound of the voice from permeating, going through, excepting the screen?

Mr. Simpson: I object to this question,——

Mr. Gallagher: Withdraw the question.

Mr. Simpson: ——as assuming facts not in evidence.

Mr. Gallagher: Withdraw the question.

The Court: It is withdrawn.

Q. (By Mr. Gallagher): Captain, if you cut out this screen here altogether (indicating), would there be any obstruction whatever between the bottom of the ventilator shaft and Hold No. 2?

A. Lower Hold No. 2, no, there wouldn't.

Q. Now, Captain, is there anything peculiar about the bulkhead or the sheet of steel which is the separation between the ventilator shaft and the escape shaft?

A. Well, I don't quite understand what you mean by "peculiar." [485]

It is one of the main watertight-strength bulkheads of the vessel.

Q. What I mean is this: Suppose you were down there and you took off your shoe and you

(Testimony of Henry C. Dyer.)

banged the heel of the shoe against the side of that steel, would there be any different kind of sound that would come from it than you would expect from any ordinary kind of sheet steel?

A. It would carry quite a distance. You could certainly hear it.

Q. It would make an audible noise?

A. Yes.

Q. Now, Captain, there has been some testimony here by the boatswain to the effect that he was standing—withdraw that.

To the effect that the after portion of Hatch No. 3 was uncovered on April 24, 1951, at the time when Mr. Hutchison and other men were working down there in the lower tween deck, in Hold No. 3, and that the winches were being operated to take out dirt slings.

Now, under those circumstances, Captain, where does the man operating the winches stand?

Would he be back here at the winches, immediately aft of Masthouse No. 2, or would he be at the winches at the—immediately at the after end of Hatch No. 3?

A. He would be on the after end of Hatch No. 3 facing [486] the masthouse.

Q. Facing Masthouse No. 2? A. Yes.

Q. Does the expression "standing at the winches" have any special significance with reference to cargo vessels of this kind? If a man says, "I am standing by the winches" what does that mean?

(Testimony of Henry C. Dyer.)

A. It means he would be standing by the throttles of the winches. There are two winches, operated by one man.

Q. So he would be——

A. Controls would be together in the center of the hatch.

Q. He would be operating the winches then?

A. Yes.

Q. If a man is standing at the winches, at the after end of the Hatch No. 3, you say he would be facing forward? A. Yes.

Q. Would the entire deck forward of the after end of Hatch No. 3 be visible to him?

A. Yes.

Q. And would these, would the door to the masthouse, that portion of the masthouse containing the ventilator shaft and the escape shaft, also be visible to such a man? A. Yes, it would.

Q. Would a man walking on deck and approaching the [487] door to that masthouse be visible to the individual who is standing at the winches?

A. Yes, he would.

Q. Now, Captain, have you been on board the Linfield Victory recently?

A. I was on board about the middle of July, or middle of August, rather.

Q. Where was that?

A. In San Francisco, or Oakland, rather.

Q. Where was the vessel docked at that time?

A. At the Oakland Army Base.

(Testimony of Henry C. Dyer.)

Q. Is the United States now operating that ship itself? A. She is.

Q. Is your company acting as general agent for it?

A. We are acting as general agent for it.

Q. Captain, did you go in the Masthouse No. 2 on the occasion in the middle of August, when you were up there in Oakland? A. Yes, I did.

Q. Was the inside of the masthouse any different in the slightest particular than indicated in these photographs on the board? So far as the physical appearance is concerned.

A. No, the same as it was from the time we took delivery of her.

Q. Has that vessel been inspected by coastguard [488] inspectors since April 1951?

A. Oh, yes.

Q. At the regular annual inspection?

A. At the regular annual inspection. Of course, while she was laid up, while she was in fleet reserve they wouldn't hold the inspections, but she was reinspected when we took her out early this year.

Q. Now, Captain, when the—withdraw that.

When you walk down or climb down this ladder, where Mr. Wise appears in Plaintiff's Exhibit No. 1, and you want to go into the deck immediately below the main deck, or the deck immediately below the last one I mentioned, to wit, two decks below the main deck, how do you get from the ladder into the hold?

(Testimony of Henry C. Dyer.)

A. There is a door opening at the side.

Q. That is, a man who goes down there would step on a plate at the particular deck level he would want? A. Yes.

Q. There is a door, then, that opens, and you walk into the particular hold, is that correct?

A. That is correct.

Q. Now, Captain, was the after section of Hatch No. 3 open on the day when you examined the Linfield Victory in the middle of August 1955, at Oakland?

A. I believe it was, yes, sir. [489]

Q. And was the vessel, so far as the hatches were concerned, in the same general condition as they were in 1951? I mean the physical layout.

A. Oh, yes, the physical layout.

Q. The hatches were the same?

A. Same hatches.

Q. And the size of the holds, and so forth?

A. Yes.

Q. On that deck, when you were aboard, you say you went into Masthouse No. 2. With the after section of Hatch No. 3 removed, could you see any light coming through the door openings, that you have referred to, leading from the lower holds into that escape ladder shaft?

A. I could.

Q. Now, Captain, on the day when you examined the Linfield Victory, did it have these ventilator cowls on the masthouse (indicating)?

A. Yes, they were on there.

(Testimony of Henry C. Dyer.)

Q. Did you go inside the Masthouse No. 2?

A. Yes, I did.

Q. Did you close the door? A. I did.

Q. Did you lock it? A. Dogged it down.

Q. Can that masthouse door be dogged or undogged either [490] from the outside or the inside?

A. Yes, it can.

The Court: I think that term might well be explained.

Mr. Gallagher: All right, your Honor, thank you.

Q. By Mr. Gallagher: When you say "dog it," will you explain it with reference to Plaintiff's Exhibit No. 5? What do you mean when you say "dog" a door down?

His Honor would like to know.

A. These objects here are dogs (indicating). They are swinging contraptions that fit against a wedge shape on the door. When you dog it down, you swing that in and jam it on the edge, which pulls the door against the gasket and makes it water-tight. The door will have six dogs on it.

Q. In other words, a dog is just an iron rod which is hinged or swiveled at one end?

A. Yes.

Q. And just take hold of it and pull it down, and it goes against a wedge-shaped piece of metal and that pressure pushes the door closed, so that it is water-tight? A. That is correct.

Q. That operation, you say, can be done either from the inside or the outside?

A. That is right.

(Testimony of Henry C. Dyer.)

Q. Now, Captain, you say you went in there and dogged that portion of Masthouse No. 2 containing the ventilator [491] shaft, and the escape shaft referred to in these photographs sometime in the middle of August 1955? A. That is right.

Q. What kind of day was it?

A. It was a clear day.

Q. Now, Captain, when you went inside, with the door closed, was there any light which came in through the ventilator cowl?

A. Yes, it was——

Q. How much light?

A. It was quite light. I don't know how to describe how much light was there. There was ample to see your way around.

Q. Could you see the stanchion and the pipe railings? A. Oh, yes.

Q. Could you see the ladder?

A. You could see the ladder.

Q. Could you see there were two shafts there?

A. Very plainly.

Q. Now, did you also go inside the masthouse with the door open? A. Yes.

Q. And what was the condition of visibility in there with reference to whether you could or could not read ordinary newspaper print? [492]

A. Well, I believe that I could have read print inside as well as out, provided I had my glasses.

Q. Now, that ship, you say, was operated by the Government? A. Yes.

Q. So that all of these things you testified to

(Testimony of Henry C. Dyer.)

have reference to physical things you say you observed when you went in that masthouse?

A. That is right.

Q. And you understand, of course, that if you have testified to anything which is not true, it would be a very simple matter for the proper authorities to check up on you by going into the masthouse themselves?

A. That is quite true.

Q. You realize that your testimony about the condition of visibility inside that masthouse relates to a material fact in this case?

A. That is true.

Q. Captain, in April 1951, was there any custom of any kind or character with reference to searching a ship for a man, not on articles, who fails to show up at the appointed time for his job, when the ship is tied up at a dock in any city in the United States? A. Not that I know of.

Q. Did you ever hear of any such thing? [493]

A. No.

Q. When seamen are not on articles, can they quit any time they want to? A. Yes.

Q. They just walk off and say nothing?

A. Well, they come back to claim their pay. But that is quite often what happens. They will just walk off and come back later, or come back to the office and claim their pay.

The Court: What are the conditions under which seamen work without articles?

The Witness: When a vessel is operating coast-

(Testimony of Henry C. Dyer.)

wise, that is, you have a portion of the voyage on both coasts, where we are not compelled by the statute to put them on articles and where, for our own convenience and the men's convenience, we keep them just on what we call coastwise articles, which just means a listing of the men employed.

And that is like—we may have some men, that might go to the hospital in New York, and we have to have a replacement there. In an intercoastal voyage, she would go to Baltimore and Philadelphia, and then sail for the Canal, and chances are we wouldn't put the man on articles until just prior to sailing for the Canal, for the simple reason if he was unsatisfactory, an unsatisfactory employee, we could get rid of him without any trouble; where, if he didn't like it, he could quit anytime.

The Court: In the meantime, until one side or the other became dissatisfied, he would work?

The Witness: Yes.

Q. (By Mr. Gallagher): Now, Captain, I am calling your attention to Plaintiff's Exhibit 15 in this case, and in particular to the log entries under date of Tuesday, April 24, 1951, and down here it says, "1715 Olive Kupau, A. B. Reported for duty."

What does 1715 mean to landlubbers?

A. 5:15 p.m.

Q. 5:15 p.m. So that at 5:15 p.m. on that day an able-bodied seaman named Kupau reported for duty? A. That is right. [495]

* * * * *

(Testimony of Henry C. Dyer.)

Q. (By Mr. Gallagher): Captain, it appears here in the record that Ernest Kalmin, the boatswain, gave testimony at an investigating unit of the United States Coastguard at Philadelphia on May 1, 1951.

I would like to ask you, Captain, whether that is the same branch of the Government I am talking about, the Coastguard, the same branch of the Government of the United States as conducts the inspection and certification of vessels of the type of the Linfield Victory. A. That is correct.

Q. With reference to these other Victory ships that your company owns and which it has operated under bare boat charters, and with reference to which it has acted as general agent for the United States of America, were each and every one of those ships inspected and was a regular certificate of inspection issued for each and every one of them by the Coastguard? A. Yes, sir.

Q. Did all of those inspections occur at either Portland or Seattle, or were they inspected at times throughout the United States?

A. Oh, they were inspected at times throughout the [496] United States, wherever——

Q. So there would be many different inspectors who inspected and passed these vessels?

A. Wherever the certificate expires, there you have to have—the first American port, has to be inspected.

Mr. Gallagher: Take the witness.

(Testimony of Henry C. Dyer.)

Cross Examination

Q. (By Mr. Simpson): Captain, have you ever tried to read a newspaper in that masthouse, even with your glasses? A. No, I haven't.

Q. Directing your attention to Plaintiff's No. 4, I am going to ask you to step down and point something out to the jury, if you will.

I call your attention to Plaintiff's No. 4, which has been identified as the starboard side of the masthouse of the Linfield Victory, and I ask you if you can tell me what this is starting up here, Captain (indicating).

A. That is a reel for a heavy lift——

Q. I misled you. I mean from the very top.

A. This is a cowl for the starboard ventilator shaft.

Q. As the ventilator shaft goes down, how far does it go down in the Linfield Victory?

A. Down to the lower hold.

Q. The same as the one on the port side? [497]

A. The same.

Q. Looking in here is there something which blocks that off or not?

A. Yes; bulkhead. This shaft is not like this one here (indicating).

Q. Plaintiff's No. 1.

A. This is not available from this end—starboard shaft is not available.

Q. Captain, in your experience have you ever at any time seen a screen or a grate of any kind over a ventilator shaft on a Victory ship?

(Testimony of Henry C. Dyer.)

A. Do you mean over the head of the shaft or over——

Q. Yes.

A. No. You have on the outside where they put anti-bomb screens on during the war.

Q. Have you ever seen them on any other kind of ships? A. No.

Mr. Gallagher: Your Honor, I think maybe there is a little uncertainty. He says on the outside. I think he should point out what he is referring to.

The Witness: Screens on the outside.

The Court: If you are not satisfied with this interrogation, you can clear it up on redirect.

Mr. Gallagher: The picture shows screens on the outside, your Honor, right there (indicating).

The Court: Let Mr. Simpson conduct his case and you conduct yours.

Q. (By Mr. Simpson): Captain, in referring to Plaintiff's Exhibit No. 4, the masthouse on the starboard side, you pointed out a cargo light, is that not correct?

A. I don't remember the names. Which is Plaintiff's No. 4?

Q. This is Plaintiff's No. 4, Captain (indicating). A. Yes, that is a cargo light.

The Court: I think you might have him stand so that the jury can see.

The Witness: I am sorry.

Q. (By Mr. Simpson): This object——

A. That particular object there is a cargo light, a portable cargo light.

(Testimony of Henry C. Dyer.)

Q. If a seaman wanted to use a portable light in Masthouse No. 2 on the port side, where would he connect it?

A. He would connect it at this outlet (indicating).

Q. You are referring to Plaintiff's No. 7?

A. Yes, this outlet right here (indicating), just inside this——

Q. This place marked on Plaintiff's No. 7 as "Electrical outlet"? A. Yes.

Q. Now, you have mentioned that these particular doors [499] were dogged down? A. Yes.

Q. When you went in—are these dogged at the present time, these you examined here (indicating)?

A. Yes, these are dogged (indicating).

Q. If a person wanted to use this light inside of Masthouse No. 2 on the port side, could he close that door and have a cord go through that dogged door? A. Oh, no.

Q. A last question, Captain: When you were in Masthouse No. 2 on the Linfield Victory, with the door closed, was the light on the inside the same as the light out on the deck, without a covering?

A. You mean was——

Q. Was the illumination as bright?

A. Oh, no, naturally, it couldn't be.

Q. With the door open, was it as bright?

A. No.

Mr. Simpson: No further questions.

(Testimony of Henry C. Dyer.)

Redirect Examination

Q. (By Mr. Gallagher): Captain, just one or two further questions. Was there any way for any seaman or anybody else to get into that portion of Masthouse No. 2 where the ventilator shaft and the escape shaft were located, from the main deck, without opening [500] the door and walking through it?

A. From the main deck?

Q. From the main deck.

A. No, that is the only access.

Q. Now, on these Victory ships, are there ladders at the forward hatch coaming and the after hatch coaming of Hatch No. 3?

A. Yes, there are.

Q. Would it be possible for a man to go from the deck down such a ladder to a lower hold, and then walk through the door at the forward bulkhead of Hold No. 3, and go from there up the ladder? A. Yes, perfectly——

Q. In the escape shaft.

A. Yes, he could come down one way and go up the other; yes.

Q. And if he came up this ladder, would there be any way he could yet out of the masthouse, excepting either walk through an open door or open the door and walk out (indicating)?

A. That is the only way.

Q. Now, you mentioned something about screens on the outside. Captain, I call your attention to the Plaintiff's Exhibits Nos. 7 and 8.

(Testimony of Henry C. Dyer.)

What are these objects here at the upper portion of the [501] ventilator cowl (indicating).

A. Those are ventilator cowls with screens.

Q. Are those the screens you referred to, which are placed over the ventilator on the outside?

A. That is what I was talking about, yes. [502]

* * * * *

Wednesday, October 12, 1955; 10:00 a.m.

The Court: Good morning.

The jury and parties being present, proceed.

Mr. Gallagher: Your Honor, at this time I request the court to receive and have marked as an exhibit the Shipping Articles, which were marked for identification yesterday.

Mr. Simpson: Your Honor, the plaintiff objects to the admissibility of them on the ground that they are in no way revelant to any issue contained in the pleadings, and that they in no way establish any issue respecting liability or damages, and for that reason are both immaterial and incompetent.

Mr. Gallagher: May I reply to that?

The Court: No, you don't need to. The objection you have, Mr. Simpson, goes to the weight rather than the admissibility. I think the door must be open for them and the weight is something which both you and Mr. Gallagher may argue to the jury, and it will be for the jury to decide.

So that the Shipping Articles are admitted.

The Clerk: Defendant's C.

(The document previously marked Defendant's C for identification was received in evidence.) [507]

* * * * *

The Court: While you are all here, I read to myself last night the instructions, reading them slowly as I would if I were giving them to the jury.

Mr. Gallagher: That is about 250 words a minute.

The Court: They are tremendously long and each of you have given a lot of B.A.J.I., with what you call adaptations. The adaptations in each case partake somewhat of the nature of advocacy, and I think that the court will reject all instructions which are offered.

Now, I don't mean by that I might not give some, but I am just putting you on notice, I don't promise to give any instructions which either of you have offered, because going over them all and seeing the context of those I had selected to give, there are so many adaptations that I don't think should be in the charge, and I will undertake to base the charge on B.A.J.I. and read the B.A.J.I. instructions.

I am just telling you that now so you will not be misled into thinking I am going to read verbatim any instruction which you have offered and base any argument upon the text of it. [570]

Mr. Gallagher: I request that the court inform us, particularly me, specifically of its action with reference to all of the proposed instructions which have been submitted to the court on behalf of the

defendant, and all of the instructions which have been submitted to the court on behalf of the plaintiff, because when this jury is instructed, and before it commences deliberation, I anticipate that it will be necessary to state exceptions to the charge as given, and to the refusals to charge.

It will obviously take me a much longer time if your Honor instructs the jury orally, without reference to any of the written requests, because under those circumstances I will have to have the reporter check with me as to the exact language used by the court, so that my exceptions will be referrable to points of law which I desire to state.

And I respectfully contend that the court must, upon request, specifically advise counsel with reference to its action as to each proposed instruction, whether it will or will not give the same. If it does not intend to give the same as requested, how much of the same it intends to give.

If it intends to reject the whole, that we be advised of that fact.

The Court: The proposed instructions for the defendant are so long that they have overworked the privilege of counsel to submit instructions. You know, from your years here, [571] it is the custom of the judges to give generally the B.A.J.I. instructions in these cases. And I think counsel should submit a modest number of instructions on special charges, but you have gone into argument. There are over a hundred pages of instructions, of these long 32-line foolscap, and it will just put too much of a burden on a judge and result in too long a

delay to go through and settle all of them with finality in advance. You are going to have to live with the instructions as given.

I will try to cover everything and I will give much of what you have requested, but not in long and argumentative language.

Mr. Gallagher: Well, of course, your Honor is entitled to form the opinion they are argumentative. I respectfully differ. I don't think they are argumentative.

I prepared these carefully and I want to call your Honor's attention to something that we discussed yesterday. When I said that Mr. Simpson, as counsel for the plaintiff, had disavowed any cause of action with reference to damages for death, based upon the allegations of Paragraph IX, I was correct.

During the last trial your Honor so stated and I have got the transcript where it occurred.

The Court: That trial is finished and done. Now, at that trial, however, I think at the outset I read the complaint. [572] And you took great exception to it. At this time you admonished me you would take exception if I read the complaint.

Now, I find throughout your instructions continual reference to the complaint and to the absence of proof upon certain things.

We are done with this colloquy. We will proceed to take further evidence or argument, as you wish. If you aren't in a position to start arguing today, we will put it over until tomorrow. I won't rush

you. I am not going to spend endless time here in debate.

Mr. Gallagher: I would prefer to have an adjournment at this time. The defendant will rest.

Mr. Simpson: I would——

The Court: You have rested?

Mr. Simpson: I have rested.

The Court: You have rested?

Mr. Gallagher: Yes, your Honor.

The Court: It is then a matter for argument.

* * * * *

The Court: The court convenes in the absence of the jury. I will hear any motions which are made.

Mr. Gallagher: If your Honor please, the defendant moves the court for an order striking from the testimony of Captain Crawford all testimony which he gave with reference to an alleged custom of searching for missing members of the crew or absent members of the crew, and his conclusions and opinions with reference to what part of a ship should be searched, upon the following grounds:

With reference to the alleged custom, none of said evidence was competent, and none of it was relevant.

The captain himself stated that it was based solely, in so far as 1951 was concerned, upon what he had read in books [575] and what he was told, to wit, hearsay.

Now, so far as what parts of a ship should be searched when a seaman not on Articles is miss-

ing or absent from work is concerned, that stated a pure, unadulterated conclusion of the captain.

Furthermore, the next ground is there is no evidence of any kind or character, no testimony given by Captain Crawford with reference to the existence of any such custom at Baltimore, Maryland, in April 1951, and no reference to any such custom pertaining to the particular vessel, to wit, the Linfield Victory.

I also move to strike out Captain Crawford's testimony that he has observed heavy screens located where the pipe railings are located in Plaintiff's Exhibits Nos. 1, 2 and 3, upon the ground that there is no evidence showing that it amounted to a custom or that the conditions were substantially similar, or that it amounted to any more than a single instance of what he had observed some individual shipowner may have done.

Those are the motions to strike, so far as Captain Crawford is concerned.

The Court: Denied.

Mr. Gallagher: Now, the defendant moves for a directed verdict with reference to the claim set forth in the so-called first cause of action, in Paragraph IX, upon the [576] following grounds:

1. There was no legal duty imposed by the Jones Act or any modification or extension of the common law rights or remedy available to railway employees to search for or discover an injured seaman;

2. The so-called survival cause of action, which is set forth in the first so-called cause of action, is

purely statutory and the sole and only basis of any possible recovery would be, in so far as damage is concerned, proof of conscious pain and suffering. And there is no proof here with reference to that cause of action, showing that if he had been searched for or if he had been found conscious pain or suffering would, in all probability, have been avoided.

The Court: The court granted such a motion when this case was tried before and was reversed on it.

Mr. Gallagher: Not that motion. Your Honor granted a motion for a directed verdict with reference to the first cause of action, in so far as it had to do with a recovery by the widow of damages for the conscious pain and suffering of the deceased.

But there is no legal duty imposed upon the owner of a ship to search for or find a seaman who is missing or absent from his job, when the ship is tied up at a dock in any city in the United States.

The Court: I can't conceive that if the Circuit Court [577] felt that to be the case they would have reversed it and ordered a new trial, when the new trial upon substantially the same evidence on that cause of action would be something which must result in judgment for the defendant.

They just don't reverse unless they think that the new trial is possibly—that if a judgment goes the other way on the new trial it would be possibly sustainable, at least, upon the legal theory.

Mr. Gallagher: The evidence is different, if your

Honor please. I don't expect you to agree with me, but I contend the evidence is different in this record than it was in the first record.

The Court: Of course, there are many areas that we have not touched on in this case that were in the other, but I think the evidence as to the first cause of action is sufficient to pose a jury question, and the motion is denied.

Mr. Gallagher: There is another cause of action set forth in the first cause of action, or another claim. That is the claim predicated upon the allegations or averments in Paragraphs VI and VII. That has to do with the conditions as to conscious pain and suffering.

Now, with reference to that cause of action, the defendant moves the court for a directed verdict upon each of the following grounds:

1. There is no evidence showing or from which the jury [578] could infer that there was any actionable negligence on the part of the defendant in respect to any failure or neglect to supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place to work;

2. There is no evidence, direct or indirect, showing that Nathanael Patrick Hutchison suffered any injury in the course of his employment;

3. There is no evidence, direct or indirect, showing that at the very time when Nathanael Patrick Hutchison fell into the shaft and sustained his injuries, or even at the time he fell into the shaft he was actually an employee of the defendant;

4. That he was acting in the course of his employment at such precise time;

5. There is no evidence, direct or indirect, showing that any condition in the masthouse was the proximate cause of the injuries which he suffered at the time he fell into the ventilator shaft;

6. There is no evidence proving or tending to prove that on the date of the accident, whatever it was, or when the accident occurred, whenever it may have been, there was any necessity for any artificial illumination of any kind or character inside the masthouse, in order to enable any ordinarily prudent or ordinarily intelligent individual to [579] clearly see and observe each and every condition of the masthouse, including, but not limited thereto, the ventilator shaft, the pipe railing safety appliance around it, the escape shaft and the ladder going down the escape shaft.

And, parenthetically, I move to strike out the testimony with reference, or, the evidence with reference to the lack of a permanent electrical installation in that masthouse upon the ground no foundation has been laid showing there was any need for any artificial illumination of any kind.

The Court: The main motion and the parenthetical motion are and each one is denied.

Mr. Gallagher: Now, I move the court for a directed verdict with reference to the last claim, which is denominated in the amended complaint as the second cause of action, upon the following grounds, and each thereof:

1. There is no evidence proving or tending to

prove that the defendant was guilty of actionable negligence;

2. There is no evidence, direct or indirect, proving or from which a jury might find that the defendant breached any legal duty which it owed to Nathanael Patrick Hutchison. And by reference thereto I incorporate each and every separate ground of my motions for nonsuit and for directed verdicts made now, if that is satisfactory to your Honor.

The Court: Yes, it is satisfactory. [580]

Mr. Gallagher: May I make one statement to the court with reference to this—their claim of a cause of action set forth in Paragraph IX, about getting him to a hospital and so forth?

The Court: Yes.

Mr. Gallagher: I would like to have this considered as included in my motion. Your Honor has denied it, but I will ask you to set aside the ruling for the purpose of allowing me to assert one further ground.

The Court: Yes.

Mr. Gallagher: There is no evidence, direct or indirect, showing any of the following conditions:

1. That in the city of Baltimore, Maryland, on April 24, 1951, or on the particular date, whatever it was, that Nathanael Patrick Hutchison fell into the ventilator shaft, there was a hospital with available operating room facilities, which could have been used for the purpose of performing an operation upon Nathanael Patrick Hutchison;

2. There is no evidence, direct or indirect, show-

ing that there was available, in the exercise of ordinary care, any surgeon competent to perform an operation upon this man's head by cutting open his skull and evacuating whatever blood may have been inside the dura at said time;

3. There is no evidence, direct or indirect, showing that an ambulance could have been obtained and could have [581] gotten to the ship where it was located, from wherever an ambulance might have been located, remove the body, conscious or unconscious, from the ventilator shaft, gotten it into the ambulance and gotten it to a hospital in time to have permitted a competent surgeon to have performed any type of surgical operation at the time he got there.

And one other ground, in so far as this particular cause of action is concerned, there is no evidence, direct or indirect, showing what the distances were which existed between where the ship was and where an adequate hospital was located.

What the distance was between where any competent doctor may have been and the hospital; whether any competent doctor was free to perform any such operation; whether laboratory technicians would have been available. All of those things which would have to take place before any operation could be performed.

That cause of action and those claims based upon that theory are, I respectfully submit, in addition to the grounds stated, predicated solely and exclusively upon speculation, surmise and conjecture, and I have in mind what the Honorable Frank Murphy

said in the Lavender case about speculation and conjecture.

The complexion of the court has changed since then, and in the case of Moore v. Chesapeake & Ohio Railroad Company, [582] the Supreme Court said, "Speculation cannot do duty or take the place of probative facts."

The Court: Mr. Simpson, are you arguing as a separate cause of action here, or basis for recovery, the failure to institute a search for Mr. Hutchison?

Mr. Simpson: Yes, your Honor, we are, in that we have alleged that the officers by failing to conduct such a search were negligent in the performance of the duty imposed upon them by law.

In other words, there are two basic aspects of our particular proposal. First of all, under the Jones Act the employer is definitely required to provide a reasonably safe place for the employee to work, and we, as your Honor knows, have pursued that.

And, secondly, that the officers, agents and employees of the defendant are expected to exercise due care for the safety of the members of the crew coming under their charge.

And we have endeavored to demonstrate by failing to conduct a search they have failed in that respect. And I have in particular, your Honor, relied upon the case of Harris v. The Pennsylvania Railroad Company, 50 F. (2d) 866, at 868, where the court, dealing with a problem where a seaman fell off of a tug, through his own negligence, dealt with the specific question, was the employer under

a duty to actually throw a line to the man who solely, by reason of his own [583] negligence, had ended up in this predicament.

The court, in rather extensive language, went on to point out that the relationship in this particular case, under the Jones Act, included not only the negligence involved—or, the failure to provide a seaworthy ship, but extended further, if there was negligence on the part of the employees in looking after the care, by omission as well as commission——

The Court: Your amended complaint puts the two into one cause of action, and I am wondering now if you are contending you have separate causes of action.

Mr. Gallagher: They contend they have three.

Mr. Simpson: No, your Honor. Our position basically is that there are two elements of the negligence embodied here.

The first element is failure to provide a safe place in which to work.

The second element of negligence is in the omission to conduct the search regarding this missing employee.

Now, that is based upon the first cause of action pertaining to the matter Mr. Gallagher referred to of conscious pain and suffering. It also is embodied in the liability with respect to the second cause of action, which is the pecuniary loss of the widow.

Mr. Gallagher: Then their claim is essentially this: If he had been gotten to a hospital he wouldn't

have died. [584] Therefore, the injuries that he suffered at the time he fell into the ventilator shaft would not be a proximate cause of his death.

But the claimed negligence, which was the proximate cause of his death, was the failure to get him to the hospital.

Now, in that connection, I would like to respectfully call your Honor's attention to this proposition: The duty to furnish care to an injured seaman arises only when the injured seaman suffers injury in the service of the ship. And there is no duty imposed upon the master of the ship, who is the sole person on board the ship, who represents the employer for this purpose, to do anything about getting a man to medical care until the master knows, has actual knowledge of the fact that such person has suffered a serious injury or at the very most until the master knows of facts from which an ordinarily prudent person would know, in the exercise of ordinary intelligence, that medical care was necessary.

Now, there is not a word of evidence in this record showing that the master of this vessel knew that this man didn't show up at 1:00 p.m. on April 24th, or that he didn't show up at 8:00 o'clock the next morning, or that he didn't show up at 8:00 o'clock the morning after that.

Therefore, there is no possible foundation here for any claim for damages on the death cause of action, predicated [585] upon the theory that the master of the vessel negligently failed to procure proper medical care for this man, there being no

evidence showing that the master knew or should have known of the necessity.

Now, there is one other point in this case——

The Court: On this motion——

Mr. Gallagher: Well, I don't want to mislead counsel. When I prepared my proposed instructions I relied upon the disavowal which the plaintiff had made during the last trial, which was after the first amended complaint was filed, during the pretrial, referred to during the trial, and it is in the record, that they did not assert any claim for damages by reason of the alleged failure to get him to a hospital or to get him medical care, on the assumption that that would be the case here, which has turned out to be an erroneous assumption.

After I stated in chambers, in your Honor's presence, and on the record I would not stipulate, in so far as this trial is concerned, that Nathanael Patrick Hutchison did not come to his death as a result of foul play or suicide, I said to Mr. Simpson out here in court orally—not in the record, but whether it is in the record or not I always repeat as near as I can remember what I said—I told him, "Well, I will go along with you on that."

I decline at this time to go along with him on that. I [586] decline to enter into any such stipulation, unless the court instructs the jury that the mere fact that Hutchison did not die as a result of foul play or suicide cannot be used by the jury as a basis of either an inference or a presumption, or anything else, in support of a finding that the de-

fendant was guilty of negligence, either in failing to supply sufficient safety appliances, in and about the ventilator shaft, or in any other respect.

So I withdraw the instruction proposed by the defendant wherein it is stated at the top that the defendant admits that the deceased did not die as a result of foul play or suicide.

And I decline to so stipulate, unless the court gives that type of instruction.

The reason I say this, your Honor, is: that when your Honor went through the instructions proposed by the defendant, you said you would refuse to give that. It was rejected.

Of course, I can't tell whether your Honor is going to give one in substance or not at this time along those lines, and I don't suppose I am entitled to know. But I am entitled to say I will not so stipulate, and I refuse to so stipulate.

The Court: Motion denied.

Mr. Gallagher: What motion is that, your Honor?

The Court: Motion for a directed verdict for the defendant, which we have just made and about midway through your [587] argument you said, "You have already denied it"—which I didn't recall that I had, and I don't think I had—"but I would like to state further argument," and you went ahead and stated one.

I have now, for what I thought was the first time, denied the motion for a directed verdict.

Mr. Gallagher: I request that the court submit to the jury separate verdicts with reference to each

claim asserted by the plaintiff, to wit the one asserted in Paragraph VIII, the one asserted in Paragraph IX and the one asserted in the so-called second cause of action, because they are three separate and distinct claims;

A claim for damages by reason of the fact there was a failure to treat injuries is the same as a claim for damages for aggravation of existing injuries, and that is entirely separate and distinct from a cause of action for the original injuries, as is held in the Hunt v. The Union Oil Company case, 111 F. (2d).

The Court: The court will submit to the jury general verdict forms in this case. One for the first cause of action, a separate one for the second cause of action.

Mr. Gallagher: Will your Honor submit to the jury the same interrogatories you submitted to them the last time, upon the defendant's request?

The Court: No. [588]

Mr. Gallagher: I do so request. And I withdraw my request that the court submit to the jury the special interrogatories which the defendant prepared and submitted to the court prior to the time that the case went to the jury last time, and which are in the file in the case.

I made a request that your Honor submit those earlier in the case. I now withdraw that request. That is, my own, the ones I prepared.

The Court: Yes.

Mr. Gallagher: The ones I am asking you to give to the jury are those that you prepared yourself,

your Honor, and submitted to the jury at the last hearing, and your Honor has said you will decline to do that.

The Court: I am inclined generally towards submitting interrogatories to the jury and I generally do, but it is a matter that lies within discretion and I will exercise the discretion against it in this case.

Mr. Gallagher: May I ask your Honor this: In so far as the claim for damages for death is concerned, suppose the jury found that there was no failure upon the part of the defendant to furnish sufficient safety appliances in and about the ventilator shaft, to provide a reasonably safe place to work and would, if that were the only cause of action submitted to them, decide in favor of the defendant.

On the other hand, suppose the jury decides, while there [589] was no negligence in causing his injuries, there was a negligent failure to get him to a hospital and to treat him and he died as a proximate result of that, and they place a general verdict upon that ground. If that is so, or if that can happen, then the defendant in this case is deprived of a substantial right because no court, your Honor couldn't tell on a motion for a new trial whether the evidence was or was not sufficient legally to support the particular grounds upon which the jury might base its verdict in the case involving the claims for damages for death.

And it is for that reason that I respectfully request your Honor to submit to the jury adequate interrogatories for the purpose of making certain

whether they base any verdict, if they render one for the plaintiff on the death claim, upon the happening of the original accident and the injuries sustained there, or upon a negligent failure to get him to a hospital, or upon both.

So that the defendant may have what it is entitled to under procedural due process of law, the foundation to show the United States Court of Appeals just what the jury verdict was based upon, so that that court may be enabled to tell whether the verdict of the jury is or is not supported by legal evidence.

Is your Honor willing to do that?

The Court: No. I did it last time and you challenged [590] everything I did. I was rather unfamiliar with intransigence, as a word, until it was applied here by your opposition, but I think it aptly demonstrates the attitude of counsel for the defendant in his approach to the court's handling of the case, and I am just not going to become a draftsman for you. You haven't submitted any proposed interrogatories to be put to the jury, and I am not going to write them at this stage, when you were drawing those you incorporated into this record by a reference and orally asked me several days ago to give and have now withdrawn.

I am not at the eleventh hour going to start out and draw a new set.

Mr. Gallagher: I will do so.

The Court: I would have to draw a new set for this case.

Mr. Gallagher: I am perfectly willing to pre-

pare proposed interrogatories and will submit them to your Honor in the morning before argument starts.

The Court: I will not consider they have been presented at a timely place in the proceedings.

Mr. Gallagher: Then your Honor would refuse the request?

The Court: I can't tell what I will do until I am confronted with the question.

Mr. Kilpatrick: Would it please the court, if Mr. Gallagher is quite through, we would like to make one motion [591] at this time.

The Court: I thought he had another motion.

Mr. Kilpatrick: Are you through, Mr. Gallagher?

Mr. Gallagher: Yes.

Mr. Kilpatrick: We would like to move at this time that the court now find, as a matter of law, and so instruct the jury, at the time when this accident—withdraw that—at the time when Nathanael Patrick Hutchison suffered the injuries from which he subsequently died, that he was within the employment of the defendant Pacific-Atlantic Steamship Co.; that he was acting within the scope of his employment.

We would like to submit to the court cases in support of the proposition that he was so within the scope of his employment.

Reviewing the evidence briefly, it shows he was there that morning, working that morning. The last time he was seen was either as he was going up the ladder at 11:00 o'clock in the morning or as he was

returning from lunch. That is the only evidence in the record on this point, and there is no evidence, no positive evidence of any kind to indicate that the ship, or anything, that was without the scope of his employment.

I cite to the court United Dredging Co. v. Lindberg, 18 F.(2d) 453, in which certiorari was denied at 274 U. S. 759, where a sick man went topside, sat down to rest and [592] stood up and fell later, and was drowned, was held to be acting in the scope of his employment.

The Court: Was that a case supporting a trial court for the granting of the motion of the kind you have made, or was it a case in which it was held that a finding of fact of the kind that resulted in that case was proper?

Mr. Kilpatrick: That question I can't answer, your Honor. Perhaps Mr. Simpson can.

The Court: I read a lot of cases in preparation for this moment of the trial, and I think it is a jury question. That it would be error for me to go over and sit in the jury box and decide it.

We will have to have the jury decide it. Whatever way they decide it, I think there is evidence here to sustain a finding either way.

Mr. Simpson: Your Honor, may I, certainly concurring with the reasoning that motivates the court, but respectfully suggest that the trial memorandum which is in the file, that we offered in the first trial, on page 4 and part of page 5, does set out some precise law regarding the question in support of the proposition that Hutchison was acting within

the scope and course of his employment at the time, and if your Honor does have time, since it is very brief, to look at that, or if your Honor would like me to, I could read it right now. [593]

The Court: All right. Read it.

Mr. Simpson: "The nature of the seaman's employment is such that his vessel becomes both his factory and home, a vestigial reminder of the ancient days when apprentices and journeymen were housed in the homes of their employers. While the watch requirements and collective bargaining agreements may call for an 8-hour day, nevertheless when off watch, he is always subject to the call of duty should an emergency arise. Hence a seaman employee is deemed to be acting in the course of his employment whenever he is aboard ship although even for purposes of his own he has temporarily ceased work. The employment of a seaman includes not only the performance of such ordinary tasks for his own comfort and convenience as are incident to and necessarily connected with his employment. Thus the courts have held that seamen were acting in the course of their employment in the following situations, to wit: Returning to his quarters after securing a drink of water; returning to his quarters after filling a bucket of water with which to wash; occupying the sleeping quarters provided for him; remaining on deck while off duty; the drowning of a deck hand on a tug while borrowing bread from [594] another vessel for a customary late hour snack."

And then it cites Section 46(a) of the U. S. Code

Annotated, the Law of Seamen by Norris, Section 682, and Section 361, detailing many cases in support of the particular situations I have referred to.

Feeling that the evidence certainly does not show that Hutchison left the ship——

The Court: There is the key to the problem. You say the evidence does not show. But isn't it a question for the jury, to determine what the evidence shows?

If you have a jury trial, it is for the jury to make that determination. For me to make it would be for me to invade their province. It is something for me to instruct upon and for the jury to decide.

Mr. Simpson: We have nothing further.

The Court: Any further motions?

Mr. Gallagher: No, your Honor.

The Court: We will adjourn until tomorrow at 9:30.

(Whereupon, at 3:30 o'clock p.m., Wednesday, October 12, 1955, an adjournment was taken to Thursday, October 13, 1955, at 9:30 o'clock a.m.) [595]

* * * * *

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Good morning.

Mr. Gallagher: May I ask a question?

The Court: Surely.

Mr. Gallagher: Yesterday, out of the presence of the jury, you made some remarks. I don't know exactly what you meant by them.

In view of what the United States Court of Appeals said about the last trial, does your Honor have any criticism of my conduct in the presence of the jury on this trial?

The Court: Actually I don't know. I haven't felt moved to make any. I think you have gotten overly zealous in your case. I wouldn't say that there is any reason to say that you had misconducted yourself.

Mr. Gallagher: Thank you.

The Court: Mr. Simpson, as I understood your remarks yesterday, you are contending that the failure to make a search for Mr. Hutchison after the accident constitutes a separate and distinct cause of action. Did I get you correctly on that?

My thought, throughout the earlier phases of the trial, in fact, through the earlier trial, was that it was thought [597] by you and was urged by you to be an aggravating feature on your first cause of action.

Mr. Simpson: The answer, your Honor, is that our intention is that while it might be, if asserted by itself, a separate cause of action, that the way we are viewing it is that it is incidental to the proof in the first and second causes of action, rather than being an independent cause of action itself.

The Court: Are you contending that it was a contributory cause of death of Mr. Hutchison?

Mr. Simpson: Yes, we are, your Honor, and the pain and suffering.

The Court: Are you contending that if Mr. Hutchison had been seasonably found he would not have died, as a result of the injuries which he suffered?

Mr. Simpson: We are contending there is a possibility he might not have, yes, your Honor.

The Court: And what cause of death are you asserting for the basis of the wrongful death claim?

In short, what are you contending was the cause of death?

Mr. Simpson: Fractured skull and subdural hemorrhage.

The Court: All right. Thank you. Now, I have a lot of business in this court. We have another matter which is pressing me considerably, was yesterday, and there were tag [598] ends of that to take care of this morning. The reporter mentioned to me—I mean the reporter, not the litigant—that Mr. Gallagher desired daily copy on the instructions of the court to the jury, and that she was experiencing difficulty in arranging for daily copy on the short notice which has been given.

Daily copy, as you know, under the practice here is usually arranged sometime in advance of the trial. Otherwise, to arrange it depends upon how many reporters are immediately available. We have, I think, two trials that are being conducted in other departments of the court which have daily copy, and all of our reporters are presently engaged, so to provide daily copy for the instructions is going to be very difficult.

Now, I know you have said in other cases that you do not consider my statement that I will give an instruction in substance as adequate. All judges have their own ways of working, which are tied somewhat to their temperament of their training.

Very early in my judicial work, in fact, beginning much earlier, I was encouraged to undertake to get into judicial work by a former judge of this court, now deceased. I tried some cases before him and he had told me, "If you ever get to be a judge, don't ever get into that California system of reading the instructions verbatim. You have got to look [599] at the jury and see they are getting it and tailor your language to the rapport or lack of it which exists at the time, and then give counsel opportunity to point out where you might have slipped on stating some rule."

I always in these cases read the definition of negligence, contributory negligence, requirement of proximate cause as they appear in these California jury instructions, taking the book and reading them directly from the book.

And I also read the requirement as to preponderance of evidence directly from the book. And then, otherwise, I have tried to absorb from the offered instructions those applicable parts and to give them substantially, so far as the law is concerned, from memory, selecting the appropriate language at the time.

After four years of doing that, to the general satisfaction of counsel in other cases, and to your general success, Mr. Gallagher, that is what we did in the Anderson case, although you didn't wish it done. I am referring to the second Anderson case. In the first Anderson case I was still so new I was afraid to do it. You won the second Anderson case.

That is what I am going to try and do. It is just

not conducive to the proper tranquillity that the jury should have, for us to spend an hour and a half or two hours in the stating of exceptions.

I know you are concerned, Mr. Gallagher, with the rule of [600] the Appellate Court, that an exception must be stated. I want to cooperate with you. I have felt that the instructions, as submitted, had just become so extensive that the practical purpose, so far as the jury practically getting anything from the instructions, is concerned, would defeat it by reading that great mass of instructions. And some of them, at least, to my mind, have the taint of advocacy, which shouldn't be in an instruction.

A judge is or should be objective about the case, and counsel are and should be partisan about the case, and I think your partisanship and the stress of the trial here is just perhaps brought enthusiasm which led to these instructions lacking the objectivity of B.A.J.I. unadapted. So I will deem that the exceptions, that you except to my refusal to give each and every one of your instructions. But I would like you at the close of the instructions to come up here and state, without specifying in intricate detail, but to specify enough that I can see or have my mind called to a serious omission or a serious misstatement.

For instance, in a case I recently tried—it was a long case and had many issues—in giving instructions in that way, although I had in my notes to give it, I overlooked a particular subject respecting a highly pertinent point of evidence, and when counsel pointed it out I immediately gave it. [601]

I will do that in this case. But I hope we can keep the exceptions down to where the jury doesn't become irritated at any of the personnel here, either you or Mr. Simpson, or the judge, because of the extended duration of the statement of exceptions.

Mr. Gallagher: May I make a suggestion to your Honor?

The Court: Yes.

Mr. Gallagher: In an effort to be helpful to the court, I will state now that I see no reason whatever why the court should not be able to state to the jury all of the law applicable to this case orally, without reading any instruction proposed by either of the parties. And the court will do that if the court will keep in mind the essential bases of action negligence.

No. 1. What duty is imposed by law upon the defendant Pacific-Atlantic Steamship Co. with reference to the allegations in the first amended complaint.

In other words, directed to those averments of the first amended complaint.

No. 2. After stating the legal duty, for example, your Honor should tell the jury what legal duty was imposed upon the defendant and upon what agent of the defendant to provide proper medical care for Mr. Hutchison.

I think the only agent of the defendant who could be charged with the performance of that duty, if it arose at all, [602] was the master of the vessel.

Next, your Honor should tell the jury what the

issues of fact are, as raised by the pleadings. Those issues are simple. There is a specific allegation with reference to alleged negligence, in a failure or negligence to supply sufficient safety appliances in and about the ventilator shaft and in masthouse No. 2, to provide a reasonably safe place to work.

Next, as the plaintiff claims, in making these suggestions I am not agreeing these issues should be submitted to the jury.

Next, she claims that as a proximate result of the same alleged negligence, in the omission to do a certain thing with reference to safety appliances, Nathanael Patrick Hutchison, during his lifetime, suffered conscious pain and suffering.

Now, as a corollary, counsel says he also claims that a failure to conduct a search was negligence. I don't know what your Honor is going to do with that, but I think you have got to tell the jury that there was or was not a legal duty to search for him simply and solely because of the fact that he didn't show up for work. I don't think there was any such legal duty.

Then your Honor will have to instruct the jury about what constitutes negligence on the part of the deceased. [603]

In other words, tell the jury with reference to him, and referring to him, that negligence is the doing of something which an ordinarily prudent seaman would not have done, or the failure to do something which an ordinarily prudent seaman would have done, under the same or similar circumstances.

the scope and course of his employment at the time,

And that if he was so guilty of negligence, and it was the sole proximate cause of his injury, then, with reference to the claims for conscious pain and suffering, and with reference to the damages for death there is no cause of action and the verdict would have to be for the defendant.

However, if the jury finds, in response to your other instructions, the defendant did negligently breach some duty it owed to Mr. Hutchison or to Mrs. Hutchison, and that as a proximate result thereof this death occurred, and so forth, and he was guilty of contributory negligence, then the jury would have to diminish the damages in accordance with the percentage with respect to which his negligence proximately contributed to his injuries.

I don't think your Honor should have any trouble with injuries, with reference to the measure of damage, if they are couched in language which does not convey to the jury the idea that your Honor is assuming that the lady is entitled to recover any damage.

Now, there are other subjects that your Honor, I suggest, [604] should cover clearly. No. 1. The statutes of the United States impose certain specific duties upon the Coast Guard with reference to the inspection of vessels. I have called the statutes to your Honor's attention.

I think you should instruct the jury that the law required the Coast Guard to do thus and so, insofar as the statute is applicable to safety of life and so forth.

And that your Honor should tell the jury that in

the absence of evidence, direct or indirect, to the contrary, the jury must find in accordance with the presumption that the Coast Guard performed its full, official duty in that respect before issuing a certificate of inspection.

I think that your Honor should also cover this question of illumination in the masthouse, to tell the jury that unless the plaintiff has proved that the inside of the masthouse on the date and at the time when Mr. Hutchison got into this ventilator shaft was so lacking in visibility as to make it necessary to have artificial illumination, and that unless the plaintiff has proved that they will disregard all of this testimony about no permanently affixed electrical fixtures.

Now, there is one other thing that I think I should call to your Honor's attention. I don't believe that your Honor should give the jury a general definition of negligence, because that would permit the jury to wander throughout the length and breadth of negligence generally, and they would not [605] be confined to the averments of the complaint setting forth Mrs. Hutchison's specific claims of negligence, as denied by the answer.

And there is a case—there are a lot of cases, but there is one in 216 Fed (2d) which holds that it is the duty of a United States District judge to confine instructions, with reference to negligence, to the specific allegations which are set forth in the complaint, and not give some general definition of negligence which would permit the jury to say, "Oh, well, I think the president of the corporation

should have been in Baltimore and I think the defendant corporation should have had somebody leading this man around by the hand all day," and they didn't have one leading him around by the hand and therefore, they are guilty of negligence and so forth.

That is why I think that these instructions should be restricted to the issues raised by the allegations of the complaint and denied by the defendant.

The Court: They will be.

Mr. Gallagher: Now, one other thing. The only possible causes of action which this plaintiff might have are strictly and exclusive statutory. And those causes of action are separate and distinct and, therefore, there must be a separate verdict as to each cause of action.

The Court: There will be. [606]

In fact, I have decided that, generally speaking, the interrogatories I worked out at the earlier trial were a good idea. Many of the suggestions of the interrogatories you proposed here are good, but they have become lengthy before you finished with them, so I will stay down this evening and work out a set of interrogatories which will require this jury to state whether they find negligence, whether they find contributory negligence, or whether they find proximate cause, whether they find conscious pain and suffering, and if they do so find it, what they allow for it.

Mr. Gallagher: I have asked for one, your Honor, which this jury can't answer, but it is a

material issue in the case. What date and what time on what date did Nathanael Patrick Hutchison hit the bottom of that ventilator shaft and suffered his injuries.

If the jury can't answer that question, they can't say there was any negligence in failing to find him or failing to send him to a doctor, and they can't say that he suffered them in the course of his employment, in the absence of their ability to make that kind of a finding.

See, your Honor, there is no evidence in this case showing how this man was dressed when he was found. Was he in dress clothes, was he in working clothes?

The evidence shows he had $125.00 or $130.00 on him at 10:00 o'clock in the morning on April 24, 1951. How much, [607] if any, did he have on him when his body was found?

If he didn't have $125.00 or $130.00, then he would have had to leave the ship in order to spend some of it. Or he was——

The Court: There isn't any evidence as to what spending possibilities or gambling possibilities were present at the ship. While you object to speculation, or what you consider speculation on behalf of Mr. Simpson, you ask it be indulged in in behalf of your case.

Now, we have come to the point, I think, I have what you want.

Mr. Gallagher: May I state one thing more?

The Court: Yes.

Mr. Gallagher: Your Honor, there is available

evidence with respect to the amount of money which was on Mr. Hutchison's body at the time he was found, and it was not $125.00 and it was not $130.00. It was less than $120.00.

The Court: It is a subject for argument.

Mr. Gallagher: It isn't in the record, though.

The Court: I am not going to curtail either of you on your argument. You argue until you feel you have got your points before the jury.

As I have told you, I have some other cases which are in critical phase and I will have to take recesses for them. I will try not to take it at times that will break the [608] sequence of a particular thought, but don't feel that I am trying to hamper you on the argument.

Mr. Gallagher: Your Honor, I want to be as nearly as I can be entirely fair to the plaintiff and entirely candid with the court. And I offer to Mr. Simpson, in case he wants it and will permit it to be introduced in evidence without any objection, photostatic copies of pages 15, 16 and 17 of the deck log or bridge log of the vessel. That record shows that when his body was found he had on him $118.20.

Now, if counsel wants to offer this photostatic copy of the record—this entry was made on May 1, 1951,—I will offer it to him and he may offer it in evidence.

Mr. Simpson: The plaintiff has no such desire, your Honor.

The Court: Mr. Bailiff,——

Mr. Gallagher: I didn't think you would.

The Court: ——bring in the jury.

Mr. Gallagher: Do you still want us to try and work out daily copy, if it can be done, because, as I understand it, your Honor is going to give most of the instructions orally. When instructions are given orally it takes a longer time to take exceptions than it would if you had it in writing, because you have to have the reporter read any that are questionable in order to take proper exceptions. Could we have two reporters? [609]

The Court: The reporter says it is practically impossible. We will see what we can do. We will try to arrange it.

The court will pursue a liberal policy with respect to the statement of exceptions, so that they needn't be stated with exact and legal perfection, in order to be considered.

We can't be perfect. There is nothing perfect in this imperfect world, so I am told, at least, by people that should know. I know that optimum tends to the same thing, so we won't expect you to tend to be perfect in stating the exceptions. [610]

* * * * *

Mr. Simpson may now make the opening argument for the plaintiff.

Mr. Simpson: The court please, Mr. Gallagher, ladies and gentlemen of the jury, we spent quite some time gathering evidence here. You remember at the outset of this particular case we asserted to you the evidence would prove certain particular allegations of the complaint of the plaintiff.

Now, before explaining my version of the case at

this particular time, in light of the evidence adduced, I would like to thank you, each and every one of you, for the attention you have shown throughout this trial. I would like to say that at the outset you will recall that we advanced really a rather easily understood position. We pointed out this was an action under the Jones Act by a seaman who had [612] been injured in the course and scope of his employment.

We further contended that under that particular law the employer, the Pacific-Atlantic Steamship Co., was required to provide a reasonably safe place for this particular individual Nathanael Patrick Hutchison to work. Then we added reasons why we believed that they had failed in that particular.

And we said the evidence would support that and it would show that the man Nathanael Patrick Hutchison had suffered conscious pain and suffering, and that his widow had suffered a pecuniary loss. Since that time you have heard a great deal of testimony, both pro and con, regarding the character of the masthouse and what was in there and how much you could see and how much you could see with the door closed and how much with it open.

I submit at this time that basically that might tend to be confusing, because in a primary sense it doesn't make one bit of difference whether the door is opened or closed, in that particular action, under the Jones Act, which is brought because there was a failure to provide a safe place for this man to work.

Now, our contention is not that the Act says if

the door is closed it is dangerous, or that if the door is open it is not dangerous, but, on the contrary, the question that you are basically concerned with is, did the Pacific-Atlantic [613] Steamship Co., in fact, provide a reasonably safe place for Nathanael Patrick Hutchison to work.

Now, it was our contention that they did not. You remember the very first thing we emphasized with respect to this was that they did not, in that they failed to provide adequate illumination in and about the area where he was working.

Now, in support of that we first brought Captain Crawford before you and Captain Crawford testified there is a custom to provide adequate illumination in and about the area where the crew will work. Now, there was no testimony to the effect that it is not customary to have adequate illumination in and about the area where they work.

So the next thing we have to consider is the very nature of this. The evidence then showed that the masthouse in question did not have any permanent fixture whatsoever for providing artificial illumination.

Secondly, there is no evidence in the record at all to date showing that in that particular masthouse there was any portable type of artificial illumination being used.

Now, let's look at the evidence for the moment, if we may, regarding the door closed, the door open. Just what did we have come before us?

First of all, you remember we had Captain Castle's deposition, in which we had testimony from

him, and you recall, [614] in answer to the question when he went into this particular masthouse, the question put to him was, "Did you examine the masthouse with the hatch door closed?

"A. The mate and I closed the hatch door to see just how dark it was in there and it was quite dark."

And this was in late forenoon. That would certainly suggest that we have a condition where you have a very dark masthouse with the door closed.

But going further, you remember questions were asked of John Hutchison and the reason I feel it imperative to bring some of this to you is that sometimes in reading this it might escape you, as to just exactly what has been read, since so much testimony here has come in by way of deposition.

Now, John Hutchison was asked questions by the court regarding this condition of when the door was closed. The court asked: "Did you close the door after you went in?" And he answered, "Yes, we did.

"The Court: Did you see around?

"The Witness: No light, no, sir.

"The Court: What was the condition of visibility? 'No light, no, sir,' might be taken to mean there was not any light fixture or open window or anything of that kind, but could you see your hand before your face at two feet? [615]

"The Witness: Not when the door is closed, no.

"The Court: Was there any window in the masthouse?

"The Witness: No windows.

"The Court: Was there any transom or skylight in the masthouse?

"The Witness: No transom or skylight.

"The Court: Could you see a light coming in through the crack of the door?

"The Witness: No light coming from the door.

"The Court: You mean to tell us it was absolute darkness when the door was closed?

"The Witness: That is right."

So with the door closed these two witnesses would certainly be supporting the proposition in this area where there was no provision made or no artificial light provided with a permanent installation, that it was dark.

But, of course, the defendant brought in certain witnesses, too. They brought in Mr. Dyer, the Marine superintendent of that company, who said that with the door closed he could look around and could see.

And brought in Mr. Webb, a marine surveyor, who said he could look around and see. But we will have more to say about that in just a moment.

The important thing I wish to emphasize is there seems to [616] be accord, at least, in the fact in this particular masthouse, with the door closed, it was dark.

Now, secondly, let's look at the question of what was the illumination with the mast door actually open. Now, the people who answered that question, you will recall that we asked the question of Mr. Castle and he gave this particular answer, with the door open:

He said, "My opinion is that with proper illumination or with the doors wide open so that daylight could get in, it would be safe enough to work in the area mentioned, in the area of the masthouse."

Now, that was the plaintiff's witness. And I point out to you there is apparent confusion here, because he says "with the doors wide open".

Now, if you will look—and you can do this when you get into the jury room—looking at these particular exhibits, looking at Plaintiff's 7 and 8, you can see the number of doors on the masthouse. But the significant thing is that actually the masthouse in question, the No. 2 masthouse displayed in Plaintiff's No. 3, has one door. It does not have doors, so a person looking at this might feel that light was going in with both doors open.

Let's go further and see exactly what the condition and the testimony in that regard is. Remember the court also asked Mr. Hutchison just what he had been able to see with [617] this door open, and Mr. Hutchison — the court asking the questions said:——

"Couldn't you see around pretty well when that door was open when you were in the masthouse? Couldn't you see around the masthouse all right?"

The witness answered:

"As soon as your eyes become accustomed to the relative darkness inside coming from the sunlight outside, it was easy to see.

"The Court: You mean by that it was like any enclosed room when you open a door and you are

coming in from a bright light, you have to get accustomed to the darker light?

"The Witness: That is right."

Then, of course, the defendant brought in witnesses to testify regarding this condition, too. Again, Mr. Dyer and Mr. Webb, regarding the visibility when this was opened. One thing of very particular note I feel should be made at this time is that I asked the question of Mr. Webb—he spoke about all the things he could see when that door was open, but the particular question I put to him was when he made these drawings, when he went to work in the area, then did they use any lights, and his answer was, "We asked to have lights put in during the time of our survey."

In other words, while working in this particular area, [618] even the defendant's witness goes so far as to say lights were necessary.

Now, from this it seems to me that it is imperative for us to draw the conclusion that with the door closed, without any permanent installation for artificial illumination, that we have to draw the conclusion that it was dark in this masthouse.

And secondly, that if the door is open we are required to say that certainly it was dim, but, fortunately, we can take our advice perhaps from the old Chinese idea that a picture is worth 10,000 words, because when we run into witnesses and recognize that the witnesses are giving their viewpoint, their impression, and if there does appear some degree of conflict here you have the advantage, we are happy to say, of looking at the exhibits, and at

this time I am going to ask you to look in particular at this area, for example, looking at Plaintiff's No. 3, which is the masthouse in question, because I think we can agree that with the door closed it was dark in there—this is with the door open—and ask yourself the question, since you know there is a floodlight in there, the testimony having been to that effect, when this picture was taken, what would the inside of this particular one look like if you took that light out.

You don't have to speculate on that at all, because you can actually look at Plaintiff's No. 8, which is a picture [619] taken without lights in there, and you can see on Plaintiff's No. 8 about the darkness, blackest thing you can see on the entire picture is that masthouse.

Of course, you might say that is taken from some distance. I ask you then simply to think of Plaintiff's No. 3, which is a close-up, if there were no light in there, and I believe that the evidence will definitely require the conclusion that it is dark when the door is closed. It is dim when the door is open.

Ladies and gentlemen, we do not resign ourselves to that one issue. We do not conclude that, in and of itself, is the only thing where there was negligence here. Our contention is that a light should have been provided, adequate illumination. This custom should not have been violated.

But we secondly contend that this was not a safe place because there were very simple things that could have been done, which were not done.

Now, I want to be understood that it is not our position that the Pacific-Atlantic Steamship Co. was under an obligation to hire somebody in the way of a safety engineer or somebody like that, to go board the ship and lead each man around by the hand to make sure that nothing happened to them.

It is not our position that they were required to go out and purchase the latest, the most modern safety devices that were available on the market, they were under an obligation [620] to make this 100 per cent accident or injury proof.

It is our position they were under a duty, though, to do what any reasonable person would do to make this safe.

Now, it is our further position they did not do this. We emphasize that because you remember Captain Crawford came before you and he said, "I have seen screens on these particular ships," and he referred to the screens. He said he had seen them going from the very deck right up to the overhead.

In addition to that what did Mr. Amundsen say? Mr. Amundsen, remember, was part of the crew, and he was asked what he had seen, and Mr. Amundsen—the question was:

"Now, is there anything else that was different in the arrangement of the Linfield Victory from the arrangement that you are familiar with on other ships?

"A. Well, other ships got screens down here, and stuff like that.

"Q. When you say 'down here', where are you pointing?"

Mr. Gallagher: I don't think that is in the record.

The Court: The jury will remember the record. He may read any portion of it.

Mr. Gallagher: I request the court to check that now. I don't think that that is in the record of Amundsen's testimony, and I request your Honor to instruct Mr. Simpson to withdraw that reading and to instruct the jury to disregard it. [621]

Mr. Simpson: I read this, your Honor, as part of the record.

Mr. Gallagher: I don't think so.

The Court: The jury will remember what the evidence was and either of you may read portions of the Amundsen deposition which were read at the trial.

Mr. Gallagher: Is your Honor permitting Mr. Simpson to read this to the jury and allow the jury to decide whether it is or is not in evidence? I request your Honor——

The Court: If it was read before——

Mr. Gallagher: I don't think it was. I would like to have the record read by the reporter. I would like to have your Honor check that, because I don't think that was read, that part of it.

Mr. Simpson: You Honor, I submit that Mr. Gallagher is in error. On my oath, as an attorney before this court, that I read this particular portion——

The Court: Will you pass it up to me? It is difficult for me, however, to remember at what time various parts of this have been read, because we

had so many readings of it. I will try to see if I can recall that this was read in the presence of the jury as evidence in this case.

Where does your part begin, Mr. Simpson?

Mr. Simpson: It begins, your Honor, on page 17, lines 1 through 12. [622]

The Court: It is your recollection, Mr. Simpson, that was admitted in evidence in this case?

Mr. Simpson: Yes.

Mr. Gallagher: It is my recollection it was not.

The Court: It is your recollection it was not?

Mr. Gallagher: Yes.

The Court: Have either of you had the transcript of the proceedings written up by our reporter?

Mr. Gallagher: No.

The Court: It will take a long time——

Mr. Gallagher: I don't think so. All she would have to do would be to find the part immediately preceding that and see if that is in it immediately following. It won't take a long time. We can find that easy enough.

The Court: You said, Mr. Simpson, you represented to the court on your oath as an attorney this was admitted in evidence at this trial?

Mr. Simpson: Yes, your Honor.

The Court: All right. You may read it. You may read it with recognition before you read it that you should recognize that if it was not and if you should prevail here, I will have to grant a new trial because you can only argue the evidence that was admitted here before this jury.

Mr. Gallagher: May I request the reporter to find that part during the time between now and 1:30 or 2:00, and read it [623] to the court so your Honor can instruct the jury it is or is not in the record, and if it is not, to disregard it.

The Court: I will ask her to find it before I instruct the jury, which will be tomorrow. I will ask counsel to inform her as to what time it was read.

Mr. Gallagher: I will show you my copy. That is the one that it was being read from, and you can see what it is on there, and I didn't put it there now.

The Court: Proceed with the argument.

Mr. Simpson: "Q. Now, is there anything else that was different in the arrangement of the Linfield Victory from the arrangement that you are familiar with on other ships?

"A. Well, other ships got screens down here, and stuff like that.

"Q. When you say 'down here', where are you pointing?

"A. Well, over a hatch. I mean, it is — you know——

"Q. The witness is pointing——

"A. Over the opening."

I might say, to make this easier, that this particular witness was referring to Plaintiff's No. 2, and we asked the question:

"You say 'the opening', you are referring to which [624] opening, the ladder opening or the ventilator opening?"

And the answer is:

"Here, the ventilator."

In other words, the testimony of a man who actually had been working with Mr. Hutchison was that on other ships that he had seen a ventilator shaft or a ventilator shaft covered by a screen at that upper portion.

But, irrespective of that, again we are helped by the actual evidence before us, because here we have an open ventilator shaft.

What is the physical evidence that actually aids us in determining this matter? Is it unreasonable, ladies and gentlemen, to expect that a screen might have been put over there? Is it unreasonable, knowing that a screen would make falling by a man into such a ventilator shaft impossible?

I ask you at this time to look at Plaintiff's No. 7, and here is the ventilator shaft we are discussing (indicating). Plaintiff's No. 7 shows a ventilator with a screen. That is one screen.

Plaintiff's No. 6, inside of masthouse No. 2, shows the overhead area; two screens in the same ventilator shaft that we are concerned with.

And then Plaintiff's No. 10, which is the ventilator shaft into which Nathanael Patrick Hutchison fell, a third [625] screen. In other words, three screens located within the same ventilator shaft. Had one been put over this particular area a man would not have fallen in.

The important thing we are trying to emphasize here is we are concerned with having people do what is reasonable. Is it unreasonable when they

already have three in the same ventilator shaft to put one here in the area to make sure a man doesn't fall in, should he make a mistake, misstep, or whatever it might be, whatever the cause may be?

But I submit aboard this particular ship there was even something else. Remember that Captain Crawford and Mr. Dyer—you remember Mr. Dyer was the marine superintendent for the Pacific-Atlantic Steamship Co.—they looked at Plaintiff's No. 4. Now, that is on the starboard side. In other words, here (indicating), looking at Plaintiff's No. 7, this is the masthouse where this happened; the other side, you have got a masthouse here (indicating). And the one that is on this side is the one which we find disclosed by Plaintiff's No. 4.

I asked him about this ventilator shaft that goes down. They said it goes on down to the hold, just like on the port side. And I asked if you could get into that ventilator shaft, and they answered no, because it is blocked off. This is the answer we got from the marine superintendent of the Pacific-Atlantic Steamship Co. and Captain Crawford, that on [626] the other side of this ship they had it set up so that a man could not get in there.

Now, I ask you, why couldn't the same thing be done on the left side and the right side, rather than just the picture of a safety precaution put in here so that a man can't get in, and on the other side leaving just some bars that he can slip through?

In other words, on the very ship in question. And we have the evidence that answers the question, was

this a reasonably safe place? The answer must be no, because it certainly is not expecting too much to expect them to put one more screen in there or to make the port side like they have already made the starboard side.

In other words, ladies and gentlemen, we are not asking for the impossible or an absolute setup here, but we are asking that this which appears to us to be the minimal thing should be done.

Furthermore, we go a step further in this plan. It is not only that they were insufficient in providing safety by providing insufficient illumination and by failing to put a screen or other protective device that would have made such a thing as this impossible, but we suggest further to you that the failure to conduct the search, with knowledge of the fact this man was missing, was further negligence on the part of this particular steamship company.

Now, Captain Crawford said it was customary to conduct a search when a man was missing, and he explained what that included, which impressed me as being nothing in the world but common sense. At 1:00 o'clock this day this man was missing. The man was going to work. Any employer who, naturally, is paying people figures, "Well, I certainly want to make sure that men are working." So if he misses, he is not showing up, what do you do?

Well, the boatswain said, "We didn't conduct a search, but actually it was customary to conduct a search."

And Crawford said, "The thing that we do in conducting a search—" and this is the common

sense "—first of all, we look in the area where the man had been working. We report it to the chief officer and then we check, and if necessary we conduct a complete search of the ship until the man is found."

I submit that had that been done in this particular case, there is no question about the fact that they would have been able to have found Scotty Hutchison, who was at the bottom of the ventilator shaft.

Of course, you might say, "What is the significance of this? Why search? What difference would it make, anyway," particularly if we think about the medical testimony that is in here. What difference would it have made? First of all, I am suggesting to you it would have made a difference in [628] that if this man had been found, and even if his life couldn't have been saved, which we don't know, but if he could have been found alive, that something could have been done by way of supportive or palliative treatment, which could have relieved any pain he might have been enduring these lucid moments, these conscious moments.

You remember even Dr. Adelstein, the defendant's doctor, said in 40 per cent of these cases there is lucidity or consciousness.

And so how are we to know such a thing didn't exist in this particular case? You might say on this medical testimony we seem to have some measure of conflict here, because we have a doctor coming in and saying, with respect to acute dilatation,

"This type of injury could cause it." That was Dr. Cefalu.

Then we have Dr. Lajoie and Dr. Adelstein saying no, and then we have Dr. Dickerson taking the stand and explaining it very definitely could cause it.

I submit, ladies and gentlemen, you don't need medical experts to see the logic involved in this. And I will try to bring out at least what to me appears to be a very logical basis that explains this. You recall the testimony of Dr. Dickerson on one particular point. He was asked the question on direct examination:

"Doctor, can there be subdural hemorrhage if the [629] heart stops beating?"

His answer was:

"No, sir. When the heart stops beating all circulation in the body ceases instantly. If there is an open or torn vessel, the bleeding stops immediately. When the heart stops working the circulation stops, because it is a pump forcing the blood around. When the pump stops everything stops."

What does that mean? If we actually consider that—and I don't pretend to be any artist on this —if we consider this to be the heart (indicating). In other words, that is a pump and it is actually pumping something that we call blood to the rest of the body, feeding the body. So that through the arteries it pumps this blood out.

Now, if we consider that this is a person's head (indicating), what is it that has been contended

for by the defense here, in the theory they have constructed?

They have said because the autopsy of this man showed acute dilatations of the heart, that he was probably at the top of the ventilator shaft, he had an attack and that he then went into the ventilator shaft and that the acute dilatation is really the cause.

Now, actually, as a practical matter, because of the testimony that you have before you, if you had this acute dilatation, what is going to take place? You just cut this [630] off, do you not? The pump stops. If the pump stops you are not going to get this blood flowing around in here (indicating). It is just like turning a faucet off at home.

Let's go a step further, if we may. If a man, on the other hand, has fallen into this area, he hits head first, he cracks his skull and he had injury to the brain and begins to bleed, so that pressure is built up here (indicating)—remember, this subdural hemorrhage is like springing a leak. The pipe has got a hole in it. One of these veins or arteries might have been injured. While this builds up the heart has to work harder to do the job that it undertakes to do. Consequently, as it works harder and harder the heart, because of the strain, the terrific strain imposed on it, as this builds up, the subdural hemorrhage, this leaking of the blood, acute dilatation sets in and the man dies.

But the important thing is that the cause of death is just as the autopsy findings, testified to here before you, showed, that Scotty Hutchison's

cause of death was the fractured skull, the subdural hemorrhage, and that that condition led to the acute dilatation of the heart. It was not a question of getting up and suddenly passing out, because the important thing is that if that happened, if acute dilatation of the heart had set in, as Dr. Dickerson testified, there could be no subdural hemorrhage because if this pump stops—in other words, if he is standing up there he hasn't got a [631] subdural hemorrhage. Then he hasn't got a fractured skull. So if you stop the pump, the circulation stopped, you would never get the subdural hemorrhage.

So, as a logical matter, we have to say the acute dilatation of the heart followed this other. It did not occur before as the defendants have tried to construct a theory here that it did.

Now, our contention is that when this man fell he experienced conscious pain and suffering, and you have testimony on that. Dr. Cefalu told you it was a course for people to go through this lucid interval; they would be perhaps rendered unconscious and then have some period of consciousness again.

Also, Dr. Dickerson told you that. Now, they couldn't tell you how long; they don't know. But the important thing is that when this man fell and went through this, we actually have nobody searching for him, nobody trying to find him.

In connection with whether his life could have been saved, you remember the testimony of Dr. Adelstein when I tried to get him to say, well now, assuming the situation we have an emergency, we

take him to the hospital, we get him there and you get ready to go with this man, and he gave me an answer about how it would take hours and how it might be difficult to get an operating room at the Good Samaritan Hospital.

And then I asked Dr. Dickerson, and he said that with an [632] emergency, it is desirable to conduct as much of an examination as you want, but that actually within a half hour he can be in there working on this person.

So for that reason, I emphasize if a search had been conducted and if he had been taken to the hospital his life might possibly have been saved, and that there certainly was a type of negligence here, failing, with knowledge of the fact this man was missing, to even conduct a search. So our conclusion regarding the liability of the defendant Pacific-Atlantic Steamship Co. must be that where, in the face of a custom to provide adequate illumination, they do not provide it, and where, with the type of screens right on their ship they could have used to cover this open ventilator shaft and they don't use it, they don't take advantage of this very simple thing, which, certainly, common sense would say would be negligible, or don't do what they are doing on the other side of the ship, and then when they know the man is missing, don't even trouble to conduct a search to find him, it is our contention that they were negligent in a manner, in that they failed to provide a safe place for this man to work.

Now, actually, this is what the evidence, we believe, shows regarding conclusions and things we

have asserted here: But how did this happen? Actually, there is no evidence in the record to show that anybody saw this happen. There is no evidence in the record to tell that—well, it was going [633] up or coming down, or that it was going into the masthouse door or coming up from below. But we would like you to know how we believe it did happen, what you can reasonably infer from the evidence. First of all, it is undisputed on this particular morning of April 24th Hutchison did report for work. He was working for the Pacific-Atlantic Steamship Co. He was ordered to go down below by Boatswain Kalnin.

He worked with some men until a little after 10:00 o'clock and came up for some coffee. That is all undisputed.

Thereafter he went down again. That is undisputed. Then we have Amundsen, who was working with him, telling us that, "I saw him go up," and he wasn't sure, he thought that was the last time he had ever seen him. He might have seen him again.

And then we have a conflict on this, because the boatswain says, "I think I saw him at noon." And he is clearly confused, because on cross examination by Mr. Gallagher it was brought out that when—before a Coast Guard inspection unit he told them that he had seen this man in the mess hall. Well, he didn't think he saw him in the mess hall. He thought he saw him in the companionway. I am suggesting to you at this time he didn't see him at all. He might have seen somebody aboard ship that

looked like him or he might have been recalling when he saw him at the time that he came up for coffee. [634]

I will tell you why we take this position: If we followed the conclusion that he was up there at noontime and that this injury occurred thereafter, we would have to draw a conclusion that doesn't go along with common sense, that is, if this man went into that masthouse after noon, why would he do it? The logical reason he would do it is because he is going back to work.

You remember it was brought out this man didn't get in until 4:00 o'clock in the morning. That the boatswain had to shake him to get him up to go to work at 8:00 o'clock. Does it seem reasonable a man who is tired, who has had very little sleep, is going to say, "I have got to get back there to work early"?

No. The more plausible explanation is that the boatswain was confusing this time with the time at coffee, and that what actually happened was that at 11:00 o'clock or thereabouts Scotty Hutchison told Amundsen, who was working with him, "I am going up to the lavatory to get a drink." And that he started up this particular ladder. That was the ladder in the No. 2 masthouse that we have been discussing so much.

There are a couple of things I want to show you in explaining how we think this happened. You can see the top of this ladder in Plaintiff's No. 1. You can see where the hands are cut. You can see

that the top of that ladder is actually a little below the deck. [635]

Now, our contention is that he left the hold down there to go up to the lavatory to get a drink. That he was coming up this particular ladder. That the rungs are not as far apart as this particular pipe rail here (indicating). That he climbed and with the lack of illumination in there with the door closed, as he climbed he reached the end of the ladder and did not know he had reached the end of the ladder, and if you take one more hand or grab at a distance, the same as these ladders, as the evidence that you look at, which is in here, that the service report will show, if you reached an exact distance of the next rung you would be grabbing a handful of air, and if you are climbing this ladder and you reached for a handful of air you go forward. There is no ladder, as the evidence shows, in this ventilator shaft. So that if you go forward there is nothing to grab hold of, and you do not know you are there. Scotty Hutchison climbed up and got either to here and went over, or he might have gone a little higher (indicating). In any event, he lost his perspective at this point, because being unable to see he was at the end of it he grabbed for what appeared to be or would be a ladder rail and it wasn't there.

He was precipitated forward, he lit on his head, he experienced this fracture of the skull and the subdural hemorrhage followed.

Now, that can be inferred from this evidence: The [636] evidence does not conclusively establish

that, that is our feeling as to how this happened. We feel that it is more plausible to believe it happened coming up than going down.

But basically it doesn't make one bit of difference whether it happened coming up or going down, because if the screens had been there, if adequate illumination had been there, if that port side had been the same as the starboard side this would not have happened.

Now, if you do find that there is a violation of a duty here by the defendant, in that they have failed to provide a reasonably safe place, they haven't done what a reasonable person would do to make this place safe for Scotty Hutchison, then what are the damages that confront you, because those damages have to be translated into dollars and cents.

At the outset we told you we were asking, because the law provides for two causes of action here, we were asking for two awards. We were asking for one by reason of the conscious pain and suffering that he suffered, and, secondly, we were asking you to bring back an award for the pecuniary loss suffered by his widow.

Now, how are you going to compute, how can you compute this conscious pain and suffering? How can you translate it into dollars and cents?

We ask you to bring back $25,000.00 for the conscious pain and suffering. You can bring back nothing if you fail [637] to find any. You can bring back one dollar. You can bring back whatever you want.

Our selection of a figure on this basis has been

quite arbitrary, because we had felt we had to pick something, that the evidence does show that the man did go through a period of conscious pain and suffering, and for that reason there should be some compensation for that.

But the thing with which we are most concerned here is that after this man died, we have a widow,——

The Court: Are you going now to the second cause of action?

Mr. Simpson: Yes, your Honor.

The Court: All right. I think we will take the morning recess.

(Short recess taken.) [638]

Mr. Gallagher: A confession is good for the soul. I want to apologize to everybody, including Mr. Simpson. I was absolutely wrong and he was absolutely right.

The part of the Amundsen deposition he read about the screen was read to the jury, and I am sorry I suffered from amnesia.

The Court: Proceed with the argument, the jury being present.

Mr. Simpson: Thank you, your Honor. Ladies and gentlemen of the jury, just before recess I started to mention the manner in which we determined what you should, providing you find liability, bring back by way of a judgment for Mrs. Hutchison, by reason of the pecuniary loss she has suffered.

Now, you will recall that when she was on the stand we asked her regarding the income during

that particular year, and we introduced into evidence Plaintiff's 17.

On that particular income tax return, it was testified that Nathanael Patrick Hutchison had earned $4,075.96 during that year. You heard further testimony to the effect that Mrs. Hutchison would receive 75 per cent of what he actually would earn; being at sea, the type of person with his room and board there, that he sent that home.

So we have to explain something further. What can that [639] pecuniary loss be? How long is Mrs. Hutchison going to live and actually the life expectancy of Mrs. Hutchison, being age 53 at the time of this particular accident, is that of 19 years.

Now, the other cause of action we referred to, where we said you would have to figure out just what would be brought in, and you will have to figure out just what will be brought in on this one, that on this one we have some figures which are a little more helpful, because we have a few things from which we can draw conclusions.

Well, maybe I will take this one down, if I may. Actually, with Mrs. Hutchison being 53 years of age and having a life expectancy of 19 years, we have to say, "Well, now, what is it that she has lost?"

If she has lost 75 percent of what he earns, you can check on my figures if you want to, since I don't pretend to be a mathematician, but the actual figure of Mr. Hutchinson's income, as I told you, was $4,075.96.

Now, in computing 75 per cent of that, the figure

I received was $3529.47, which would be 75 per cent of this figure that he earned (indicating).

In other words, it would constitute the pecuniary loss she would actually suffer for her life expectancy of 19 years. If we multiply that out, we get— which gives us a total of $69,059.93. [640]

Now, that is the actual figure that we get by this computation, but there are factors to be taken into consideration respecting the health of Nathanael Patrick Hutchison, the type of employment and other factors that enter in. So we believe that this particular figure should not be asked for. Consequently, what we are asking you to do is to bring in the sum of $60,000.00, which, on the basis of these figures we have given you, we believe to be a reasonable computation of the pecuniary loss that Mrs. Hutchison, his widow, has suffered by reason of the failure of the Pacific-Atlantic Steamship Co. to provide Scotty Hutchison with a safe place to work.

In other words, ladies and gentlemen, to simply summarize what we have endeavored to present to you, is that the Pacific-Atlantic Steamship Co. is under a duty to provide a reasonably safe place for this man to work. We believe they violated that duty by not providing adequate illumination — a simple thing—by not providing screens, by not providing the type of safety or protective devices they had right on their own ship.

We believe the evidence shows there has been definite damage and detriment caused here, and we believe, insofar as dollars and cents can be trans-

lated into pain and suffering, or just the reverse, we ask you to bring back whatever you deem to be a fair and reasonable verdict for the conscious [641] pain and suffering, and a fair and reasonable verdict for the pecuniary loss that Emma Hutchison has suffered by reason of this negligence.

The Court: Mr. Gallagher, you will come to the end of some phase of your argument. When you do that we will take the noon recess.

Now, I will take it either at 12:00 or if you want to carry on until 12:30, you let me know when you come to a good breaking point.

Mr. Gallagher: Thank you, your Honor.

May it please the court, ladies and gentlemen of the jury, counsel for plaintiff, I join with Mr. Simpson in reference to the proposition that you have been attentive. Obviously, under our system of government any citizen who sits as a judge is required by the nature of his or her duty and oath to be attentive, so that in the final analysis that is not any type of argument to address to a jury with respect to the evidence in the case.

For example, let's assume that any one of you happen to be a party to a lawsuit, and you came in and tried it before his Honor without a jury. You would expect him to be attentive, wouldn't you? He is a judge. So that it wouldn't be arguing the case to him to thank him for doing his duty.

I mention that because I want you to keep in mind the side issues, the extraneous things which have nothing whatever [642] to do with this law-

suit, which may have been mentioned in Mr. Simpson's argument.

And I want you to tar me with the same brush, if I argue things to you that aren't based upon the evidence which you have heard, and which you have seen. Then I ask you, from the bottom of my heart and conscience, to totally disregard it.

Now, I am going to say something that isn't based on the evidence, but I want you to bear with me. As you can tell, I am temporarily suffering from what may be a slight case of laryngitis. Therefore, like Demosthenes, but not using rocks in my mouth to learn how to speak clearly, I have a coughdrop in there and I want you to excuse me for the necessity of having to use them. I may even put one in my mouth during the course of my argument, but I know that you will not feel offended by that when you realize the necessity for it.

I am going to perhaps be a little bit disorganized in your minds with reference to some parts of the argument, but I ask you to bear with me in that, also. I may not start at what is the logical beginning, but if I fail to do so it is because I want to comment on two or three things perhaps before we get into the meat of the situation.

The first thing I want to call your attention to is this: I do not intend to argue the question of damages or [643] the subject of damages, and the reason I do not intend to do that is that I will contend by argument, submitted to you, that there is no liability upon the part of my client for damages.

But just to call your attention to how far the plaintiff would want to lead you, let's take Mr. Simpson's suggested figure to you. If you gave this lady what he asks for, if you decide she is entitled to anything under the law and the facts, and she invested it in good common stocks or in other good investment, what percentage per year would she collect, and how much would be left to distribute to her relatives at the end of her life?

Now, that is all I am going to say about that subject. And I would like to ask each one of you to please remember this: When I conclude my argument for the defendant I cannot answer anything which Mr. Simpson may say to you in his closing argument. So whatever he has to say about any subject in this case, it was his duty to say before my time to argue commenced, unless he says it solely in answer to something that I say.

Now, we will hear the judge give instructions when we are all through with the arguments. But I would like to take you back to your impanelment. Each one of you told me that if you were accepted as a juror you would perform your duty under your oath as a judge. [644]

Now, a judge cannot be partial. A judge cannot predicate his finding upon sympathy for a widow or for anybody else. A judge cannot decide any disputed issue of fact upon speculation, surmise or conjecture.

A judge must decide the disputed issues of fact submitted to him, and you are a composite judge, upon the direct evidence which has been intro-

duced before you and which you have heard from the witnesses, either by way of deposition or from the witness stand, where such witnesses testify to things which constitute direct evidence, as, for example, there might be a dispute about whether Mr. Simpson happened to be in this room at this time. I might be called as a witness to testify under oath to that fact.

Somebody might claim that Mr. Simpson parked his automobile at a quarter to 12:00 down in front of the courthouse, and he may get a ticket on it. He would defend himself and say he wasn't even there. And he puts me on the stand as a witness. I take an oath and I say, in answer to questions, "I was in Judge Tolin's courtroom at that time and I saw Mr. Simpson there at that time."

Now, that is direct evidence. But you don't have to infer anything. Let's assume that I happened to be outside of the courtroom in a place where I could watch all means of exit from this room, out through his Honor's chambers or out through this door (indicating) and, say, I had been out [645] there from 11:30 until 12:00 o'clock. And I got on the stand as a defense witness and I was asked what I was doing, and I testify, "Well, I was out in the hallway, right in front of Judge Tolin's courtroom."

"Well, did you see the hallway leading from Judge Tolin's chambers, in other words, the back exit from the courtroom?"

"Yes."

"Was that under your observation at all times?"

"Yes."

"Was the door leading from the courtroom under your direct observation all the time?"

"Yes."

"Did you look away from that area at any time?"

"No."

"Did Mr. Simpson come out of that courtroom at any time while you were out in the hall?"

"Yes."

"What time did he come out?"

"Oh, he came out at 12:00 o'clock noontime."

"Well, by the way, did you see Mr. Simpson go into the courtroom?"

"Yes, I saw him go in at 11:00 o'clock, or after a recess."

You asked me if I had been out there from half-past 11:00 to 12:00. I said yes, but I was out there before. I [646] was out there at 11:15 when I saw him walk in the door.

Now, that would be testimony under oath from a witness, which would be indirect evidence, because from the positive testimony which I give, which doesn't prove in and of itself Mr. Simpson was in this room, any fair-minded jury, if it believed me under oath, would or could infer from what I told them that Mr. Simpson could not have been out on the street at a quarter to 12:00. That is indirect. It is proof of one fact by a witness under oath, from which the ultimate fact in issue may be logically inferred. In other words, it is an

inference which a reasonable mind would deduce from the testimony which I had given.

Now, in this case Mr. Simpson tells you that he wants you, under your solemn oaths as jurors, where you said you would restrict yourselves to the evidence introduced in this case, as guided by the instructions of the court, he asks you to do this:

He tells you about some theory, he says, "We think what happened is this:" and, parenthetically, I will not refer to the deceased by any nickname; I will call him Mr. Hutchison.

He tells you that Mr. Hutchison at 11:00 a.m. on April 24, 1951, came up this ladder in the escape shaft and that at the time he came up the ladder the masthouse was in total darkness, and that when Mr. Hutchison got up here he took hold of this, and then he reached up and he took hold of this, [647] and not being able to see, and not knowing where he was or what was going on, he went through—(indicating)—he wasn't watching him up here (indicating), but the only two or three ways that, even theorizing, could support Mr. Simpson, he either struck his head between the top of this bulwark or steel plate, which goes down to the bottom of the two shafts and separates them, or he put his head through, between the second rail and the top rail, or he got up here and put his foot on the middle rail and then lost his balance (indicating). That is what they want you to guess about. That is pure, unadulterated speculation.

If the court tells you, as I believe his Honor will, that your verdict in this case, in all respects, must be based upon evidence, direct or indirect, and if he defines direct and indirect evidence to you ladies and gentlemen of the jury, you cannot, I respectfully submit to you, say under your oaths as jurors, that there is any evidence whatever in this case to prove that Mr. Hutchison did what Mr. Simpson wants you to say when you come back here and look us all in the face, "We and each of us tell you, Lasher Gallagher, and tell you, Raymond Simpson, and tell you, Judge Tolin, that we have found direct or indirect evidence which has been introduced into the record in this case before us, that Nathanael Patrick Hutchison came up that ladder at 11:00 o'clock a.m.; that he didn't know what he was doing; that [648] the masthouse was in total darkness and he couldn't even tell that there was any difference between the distances between the rungs of the ladder or the shape of the ladder, and that he took hold of this plate here at the top of the separating bulkhead with his hands (indicating), and he thought it was a rung of the ladder; that he then, not being able to see, reached up and felt around and he got hold of the middle course of this pipe railing and he thought that that was the next rung of the ladder, and that he kept on coming up the ladder with his feet, and that then he reached up and he took hold of the top course of the pipe railing and he thought that that was the top rung of the ladder, so he kept

on going up and he got to the point where he toppled into the ventilator shaft."

Now, I ask you, in all sincerity, can any one of you conscientiously do that? I will suggest to you one reason, which is absolutely and totally against any such supposition.

You see, there is no evidence of it, no evidence or proof of the fact that the man's body was found in the bottom of the ventilator shaft on April 30, 1951. Of course, we know he was there, but that, we will say, is an example of indirect evidence. His body was there.

But can you reasonably infer from that single factor that he fell into that shaft at 11:00 o'clock a.m. on April 24, 1951, or that at 11:00 o'clock a.m. on April 24, 1951, [649] the masthouse door was closed, or that on April 24, 1951, no light was coming in through the hollow tubing of the ventilator? With all of those things in there, are you going to accept the suggestion that Mr. Simpson made to you, about this 11:00 o'clock a.m. proposition?

Mr. Simpson even denies the veracity of one of his own witnesses, in order to attempt to get you to render a verdict for the plaintiff.

When Mr. Simpson, representing Mrs. Hutchison, offered and read the deposition of Ernest Kalnin, which was taken under oath, the plaintiff vouched for that man's integrity and veracity. Now, what did that man say?

And ladies and gentlemen of the jury, if you have any doubt upon the proposition, that when a

witness is offered by any party in a civil or criminal case, that the party who puts that testimony on under oath before you, either by way of deposition or by way of oral testimony, vouches for the veracity and integrity of the witness.

I will guarantee that the judge will tell you that the party does vouch for the veracity and integrity of witnesses produced by him or by her. And it does not lie in the mouth of the attorney who offers sworn testimony of his own witness, his own client's witness, to thereafter get up before a jury and say that witness didn't know what he was talking about, unless there is some evidence in the record to support [650] an argument of that kind.

Now, what did Mr. Kalnin say? You recall that Mr. Simpson told you that Mr. Kalnin was confused on cross examination by Mr. Gallagher, with reference when he last saw Mr. Hutchison.

Now, I want to call your attention to a couple of things. Mr. Simpson was present at the time that Mr. Kalnin gave his deposition. Mr. Simpson saw the oath and heard the oath being administered to Mr. Kalnin.

Mr. Simpson asked Mr. Kalnin all of the questions which were asked on behalf of the plaintiff during the taking of Mr. Kalnin's deposition.

And on direct examination by Mr. Simpson, this is what happened on that subject:—I will start on page 4, Mr. Simpson, at line 14——

"The Witness: There was Hutchison and four other sailors and myself down in that hold.

"Q. What did you do with reference to this group?

"A. I told them what to do and laid out the work.

"Q. Can you be specific as to the time of day?

"A. That was about 8:00 o'clock in the morning and we turned to in No. 3 hatch. The first thing we did there was open one section, aft section of No. 3 hatch. There's a ladder there and there's also a ladder in midship house. You can use either way to go [651] down that hold.

"Q. Now, what happened after you gave these orders, that you observed?"

"A. Well, I already told you, went down by the hatch and went to work.

"Q. For how long did you work?

"A. Until 10:00 o'clock.

"Q. Then what did you do?

"A. Then we stopped and went for coffee.

"Q. Then what did you do?

"A. At 10:15 we went back in to clean up again, finish the job.

"Q. How long did you work?

"A. Worked until dinner.

"Q. How long was that?

"A. Knocked off about ten to 12:00. Always give time to clean up.

"Q. For how long did you observe Mr. Hutchison working in this hold?

"A. He worked until dinnertime.

"Q. Did you observe Hutchison leave the hold?

"A. He left to come up dinnertime. He left

about ten minutes to 12:00, the same as the rest of the gang.

"Q. Was there any occasion thereafter when you [652] observed Mr. Hutchison?"

I am stopping reading now because I wanted to interject something in a parenthetical way. The word "thereafter" in that question asked by Mr. Simpson obviously referred to after the time he saw Mr. Hutchison, come up at ten minutes to 12:00, which is only ten minutes before noontime and which is fifty minutes after 11:00 o'clock a.m. Resuming the reading:

"Q. Was there any occasion thereafter when you observed Mr. Hutchison?

"A. Well, I seen him once more after that, coming from the mess room.

"Q. Did you observe anything in particular about him? "A. No.

"Q. When was the next time that you observed Mr. Hutchison?

"A. That about—in Philadelphia, I believe.

"Q. About Philadelphia?

"A. In Philadelphia.

"Q. When was that?

"A. That was when we found him then.

"Q. What date was it, approximately what time?

"A. Before arrival in Philly on April 30th, about six days later."

That ends, Mr. Simpson, on page 6, line 16. [653]

Now we get to the cross examination, where he was confused by my cross examination. And keep

in mind, ladies and gentlemen of the jury, when Mr. Simpson referred to this testimony about Mr. Kalnin having stated one time he saw him in the mess room at noontime and the other time he saw him just coming out of the mess room, he was talking about that for the purpose of having you find that Mr. Hutchison came up out of that shaft at 11 o'clock a.m., as Mr. Amundsen said, and never did go into the mess room for lunch. In other words, that was his purpose, to take you by the hand and have you ignore Kalnin's testimony that he saw Hutchison come out of that hold at ten minutes to 12:00, because he couldn't possibly get anybody who can sit on a jury to find that Mr. Hutchison was involved in an accident at 11 o'clock a.m., if he was observed by a witness whom you believe coming up out of a hold at ten minutes to 12:00.

And when you are considering the effect that an argument may have on you, remember that, as we all know, we can go back to sophistry, if any of you ever have studied philosophy, and I think you know what sophistry is. A sophist is a person who can make what appears to be on the surface a very reasonable statement, but if you probe into the background of it you find out it is specious. And an argument based on a couple of questions asked by me of Mr. Kalnin, which showed that on the Coast Guard hearing on May 1, 1951, this deposition [654] of Kalnin having been taken on May 17, 1952, over a year afterwards, solely with reference to the place where he had seen Mr. Hutchison,

you get to cross examination where, by my cross examination, he was confused——

Mr. Simpson: Page 21, Gallagher.

Mr. Gallagher: Thank you.

"Q. Do you recall giving testimony at a Merchant Marine investigating unit of the United States Coast Guard at Philadelphia, Pennsylvania, on May 1, 1951?

"A. Yes, that's where we went then.

"Q. At that time were you asked the following questions and did you give these answers:

"By Mr. Bikle:

"Q. You saw him at lunch?"

And parenthetically, remember this testimony before the Coast Guard is under oath, the same kind of an oath those witnesses took who testified here.

"A. I seen him at dinnertime but I didn't stay long, coming out the mess room, just had a bowl of soup, started out of the mess room. I didn't see him any more after that.

"Q. The last place you saw him was in the mess room?

"A. That was the last place, yes.

"Q. What was his condition regarding sobriety? [655]

"A. Was he sober?

"Q. Yes.

"A. Oh, yes, he was sober, slight hangover."

Then my question, after having read that part of the record from the Coast Guard hearing:

"Q. Did you give those answers to those questions?

"A. Yes. He was sober that day, I know that.

"Q. But he did have a hangover?

"A. I guess so, from the night before—didn't feel good."

I stopped reading, Mr. Simpson, at line 9, page 22.

Now, isn't it quite obvious that on May 1, 1951, Mr. Kalnin might have had a clearer recollection of whether the last place he saw the man was in the messroom or just coming out of the messroom, than he would on May 17, 1952?

But aside from that, ladies and gentlemen of the jury, that is utterly immaterial. The fact is that their own witness under oath establishes as a fact, by direct evidence, that Mr. Hutchison came out of hold No. 3 at 10 minutes to 12:00. And if he did, it is utterly impossible for him to have been involved in any accident at 11:00 a.m. on April 24, 1951.

And all of the legal legerdemain witnesses might be concocted and all of the sympathetic legerdemainism which [656] there might be suggested cannot change those facts.

And, ladies and gentlemen of the jury, no lawyer should ask you to find that Nathanael Patrick Hutchison was involved in an accident at 11:00 a.m. on April 24, 1951, when he himself has not only heard the sworn testimony which utterly refutes any such proposition and he himself has read it to you as testimony under oath, which they ask you to believe.

Your Honor please, I am sorry I ran over 12:00 o'clock. I could have stopped. Your Honor knows I

have a one-track mind. I would have stopped at 12:00.

I am sorry it is almost 15 minutes past 12:00.

The Court: That is all right. We like counsel to come to a good breaking place. It is unfortunate when an argument must be broken someplace in the course of it for a recess.

Mr. Gallagher: I think the most unfortunate thing, your Honor, is that juries have to listen to arguments.

The Court: Will 1:30 be a convenient time or is it an inconvenient time? Will your voice be recovered by then, Mr. Gallagher?

Mr. Gallagher: It seems to be pretty good right now. It is all right with me. I can keep on going if you want, and finish, but——

The Court: Let's take the recess until 1:30.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same date.) [657]

November 21, 1955, 1:30 o'clock p.m.

The Court: The jury being present, you may proceed with your argument.

Mr. Gallagher: May it please your Honor, ladies and gentlemen of the jury, Mr. Simpson, I think I read enough to you from the deposition of Mr. Kalnin to demonstrate that, so far as his testimony is concerned, no accident happened at 11:00 a.m. on April 24, 1951.

Now, I would like to call your attention to Mr. Amundsen. You will recall that Mr. Amundsen was

an experienced seaman, having had, as I recall his testimony, at least 20 years' experience and perhaps 22.

And so that I will not consciously misrepresent anything to you, I will read what he said.

"Q. How long have you been going to sea?

"A. Twenty-two years.

"Q. That is your usual occupation, is it, as a sailor?

"A. Yes, A. B."

I believe you will recall that we stipulated that A. B. means able-bodied seaman.

Now, Mr. Amundsen testified that at 8:00 o'clock in the morning, "we went down there and cleaned holds, and the boatswain come and knocked us off for coffee time. [658]

"Q. Do you remember what hold it was?

"A. No. 2."

Well, now, I don't think there is any question about the fact that they were in hold No. 3, because the evidence shows that this access shaft or escape shaft, as it is sometimes referred to, permitted access only into hold No. 3. But I don't think you should blame Mr. Amundsen, because he said hold No. 2. That really is not something for which a witness should be criticized.

Then he goes on:

"Q. And you were down in the hold?

"A. Yes."

These questions, ladies and gentlemen of the jury, were asked of the witness by a Mr. Kenady—K-e-n-a-d-y—who represented the plaintiff at the

time this deposition was taken in San Francisco on July 18, 1952.

"Q. Was Scottie with you?

"A. Yes, sir.

"Q. From 8:00 o'clock in the morning?

"A. Yes.

"Q. Would you continue with your answer? What happened next?

"A. Well, then we worked, and so the boatswain come and knocked us off there about 10:00 o'clock, 'Come up for coffee.' [659]

"Q. You say you came up for coffee. How did you come up from the hold?

"A. Well, we come up the access ladder there on the masthouse.

"Q. Where is that access ladder located with respect to the hold you were working in?

"A. It is on the port side.

"Q. You say it is on the port side?

"A. Yes."

Skipping the next question, and then the question:

"Q. And when you came up for coffee time you say you used that access ladder?

"A. The same—we come up—yes, sir, we come up the same way as we went down at 8:00 o'clock in the morning, through the access ladder of the masthouse ladder."

And at this point, ladies and gentlemen of the jury, I want to call your attention to a little conflict there which really doesn't mean much, but Kalnin, you will remember, testified that in the morn-

ing at 8:00 o'clock he saw Mr. Hutchison go down the ladder at the after end of hatch No. 3. That is in Mr. Kalnin's deposition.

"Q. You say they are all in the same place, is that what you mean to say? "A. Yes. [660]

"Q. Will you tell us what happened then? You went up for coffee time; did Scottie go with you?

"A. Yes, sir, and we walked on the deck together; went in and had coffee; were sitting there talking, * * *"

Then he testified they went into Scottie's home and sat down. When I say "Scottie" I am repeating his designation; that is not mine.

And he referred to the fact that he had—that Mr. Hutchison told him he had money and he wanted to go out that night, he could go and Mr. Hutchison would lend him the money, and then Mr. Amundsen could pay him back.

That has nothing to do, however, with the facts of the case. I merely want to tell you what I am leaving out.

"Q. And while you were with Scottie in his forecastle, and smoking, did you have an opportunity to observe his condition as to sobriety?

"A. He was sober,——"

Was any of the rest of that answer read, Mr. Simpson, on page 9?

Mr. Simpson: Lines 12 and 13——

Mr. Gallagher: I mean the answer on lines 6 and 7.

Mr. Simpson: No.

Mr. Gallagher: I have read all that was read?

Mr. Simpson: Yes. [661]

Mr. Gallagher: "Q. And were you sober that morning?

"A. Yes, sir, I didn't even go ashore."

Now, what significance would a reasonable person draw from that last sentence? Mr. Amundsen was asked whether he was sober. He, Amundsen, was sober, and he said, "Yes, sir. I didn't even go ashore."

Can you reasonably infer that Mr. Amundsen said he was sober and gave as the reason for it the fact he didn't even go ashore? Why, otherwise, should Mr. Amundsen, when merely asked the question, "And were you sober that morning" why didn't he just say, "Yes, sir."

Why did he add, "I didn't even go ashore"?

And, of course, whether Amundsen was or was not sober is not a determinative fact in this case, but I am reading you what he said. And I am reading you the questions that the plaintiff's lawyer asked of Mr. Amundsen.

"Q. Now, would you tell us what happened after you finished coffee?

"A. Well, then the boatswain come and said, 'Well, boys, let's go.' So, we went back the same way, down the shaft alleyway, I call it, you know, aboard the ship.

"Q. You went back the same ladder that you came up?

"A. Yes, and we start working again like we [662] did before all morning, same thing, cleaning

holds, sweeping and picking up papers, and making a pile over there so when they open up the hatches they take it out and put it on deck.

"So—well, we were working there, so Scottie says, 'Well, I'm going to go up on deck and get a drink.' So, he walked back there where—I saw him walk up, because I saw him go out the door and walk up the ladder, and so we worked there. So, well, we went up for lunch—to eat dinner. That was about, you know, around 11:00. The boatswain came in and knock you off, so we went up on deck the same way. We walk up the same—you know, up and down all morning. So, we went and washed up and went in the messhall and eat dinner.

"Q. And did you go back down in the hold to work after dinner? "A. Yes.

"Q. Was Scottie with you? "A. No.

"Q. When was the last time that you saw Scottie?

"A. Well, that was around 11:00 o'clock or something like that.

"Q. That was when he came back down into the hold with you, after coffee time? [663]

"A. That was at 10:30.

"Q. At 10:30, and it was sometime later, but before lunch, that Scottie went back up?

"A. Yes.

"Q. Did you notice what route he took?

"A. The same way.

"Q. Through the door? "A. Yes."

And I call your attention to what is a leading question. This isn't the witness' language. It is a

leading question, putting words into his mouth by the attorney who asked the questions, Mr. Kenady.

"Q. And that is the last you saw him?

"A. Yes."

And next question, "And did you say anything to him as he left?

"A. I can't remember now."

Next question, "When did you next see Scottie after this?"

Notice, ladies and gentlemen of the jury, this question doesn't put the words into the witness' mouth. It is a question asking for information, depending upon the recollection of the witness, without a suggestion of what the answer should be. I will repeat the question:

"When did you next see Scottie after this? [664]

"A. Well, I may have seen him up in the dining room, I'm not sure."

That is on page 11, lines 8 to 10 on the direct examination; not cross examination.

Now, we go over to the cross examination, where Mr. Schaldach, who took my place for this deposition up in San Francisco, this deposition of Mr. Amundsen's, and we will find out what he said about that same subject. Page 25, Mr. Simpson.

Mr. Simpson: Thank you.

Mr. Gallagher: "Q. How long after you came back down there was it that he told you he was going to get a drink?

"A. Well, let's see. We come down there, I'd say—I'd say at 10:30, after coffee time, and I'd say, oh,—well, 10:00—I mean, 11:00 o'clock.

"Q. About 11:00 o'clock?

"A. Yes, something like that."

Repeating the answer, "Yes, something like that.

"Q. And you saw him go through the door in the hold? "A. Yes.

"Q. That door leads to this escape hatch?

"A. Yes. [665]

"Q. And that is the last you saw him?

"A. Yes.

"Q. Did you notice whether or not he came back down? "A. No, he didn't come back.

"Q. All right. Did you see him at lunch time or supper time?

"A. I'm not sure, because, you know, we all wash in there, you know; hungry, and what have you, you know. Sit down and, you know, start to eat.

"Q. What do you call your noonday meal?

"A. Lunch, or——

"Q. Lunch. All right. What time did you come up the hatch, this escape hatch, for lunch?

"A. About 11:30 or 25 minutes to 12:00.

"Q. I see. And is it your recollection, Mr. Amundsen, that you did not, at any time after 11:00 o'clock, see Hutchison?

"A. Well, I'm not sure if I saw him for lunch. I wouldn't swear to that.

"Q. You wouldn't swear to that? "A. No.

"Q. Could it be possible that you may have seen him for lunch? [666]

"A. Yes, sir, yes, sir."

Now, I respectfully submit to you ladies and

gentlemen of the jury that when you take the testimony of Kalnin and you take the testimony of Mr. Amundsen, it would not be a fair and impartial finding on the part of the sworn judge to say from that evidence that the plaintiff has proved, by a preponderance of creditable evidence, that Mr. Amundsen was involved in any accident at 11:00 a.m. on the morning of April 24, 1951.

You may wonder what this is all about. '51, isn't that the right date?

A Juror: You said Amundsen. You mean Hutchison.

Mr. Gallagher: Excuse me. Mr. Hutchison. I am glad you called my attention to that.

No impartial judge would take that evidence, ladies and gentlemen of the jury, at least, I don't see how any impartial judge could say, under his oath say from that testimony Mr. Hutchison was involved in any accident at 11:00 a.m. on April 24, 1951.

You may be wondering why this is of any importance. I will try to tell you. The plaintiff, as I think the judge will tell you, must prove by a preponderance of evidence, regardless of all else, that Mr. Hutchison suffered a personal injury in the course of his employment.

Now, unless you can come back in here and tell us under [667] oath, as jurors, that this evidence proves that Mr. Hutchison fell into that shaft at 11:00 a.m. or about 11:00 a.m. on April 24, 1951, I don't see how you can say that he suffered any in the course of his employment. That is why they

want you to find that an accident happened at 11:00 a.m. on April 24, 1951.

As I understand Mr. Simpson's argument, he admits that Mr. Hutchison did not go into the masthouse from the top or from the bottom at any time between 1:00 p.m. and 3:00 p.m. on April 24, 1951.

If he doesn't admit it, it doesn't make any difference, anyhow, because the evidence is without conflict that he did not. Mr. Amundsen, their witness, under oath says he and the rest of the gang, excepting Mr. Hutchison, went back down the ladder in the masthouse at 1:00 p.m. and that they—and Mr. Kalnin says they quit work at 3:00 p.m., and all of them came back up.

Mr. Kalnin testified he was standing at the winches. Captain Dyer told you—and this is without conflict—that standing at the winches means that Mr. Kalnin was here at the after end of Hatch No. 3 (indicating).

That is just like you ladies and gentlemen are there and I will go over there (indicating). Here is a masthouse door (indicating). It is on the wrong side of the ship because it is a starboard, but if I had to walk between you [668] and this door to get in, don't you think you would be able to see me?

We proved without conflict that a man standing at the winches here (indicating) at the after end of hatch No. 3, would have a clear and unobstructed view of the entire deck of the vessel forward of that point.

Nobody could get into that masthouse door without walking through it, from the deck. Mr. Kalnin

told you that he did not observe Mr. Hutchison anywhere on deck at any time after he saw him coming out of the messroom or in the messroom.

Now, Mr. Kalnin was there at the winches. Mr. Dyer told you that a man at the winches would be facing forward. He would be looking right in that direction. That is, his face would be pointed that way (indicating).

Of course, momentarily he might look down in the hold or the hatch. Well, are you going to believe that Mr. Hutchison could have run across the deck and run into that masthouse door without Kalnin seeing him between 1:00 and 3:00?

Of course, we have got the positive testimony that he didn't ever go down in the hold after 1:00 o'clock. He didn't show up at 1:00 o'clock to go to work.

Now, it isn't our burden to prove these things. The court will tell you, I am sure, that with reference to every material issue of fact in this case, excepting that of [669] perhaps contributory negligence, the burden of proof is on the plaintiff.

Now, you ladies and gentlemen of the jury have enough experience and enough common sense, without any judge telling you so, that the only way you can sustain the burden of proof is to produce witnesses who can tell the jury about it, or produce written things which tell you about it. There is no burden on the defendant in this case to prove how, when or why Mr. Hutchison got into that ventilator shaft. And if you think, or doubt that, if you think otherwise or doubt it, you ask the judge whose

burden it is in this case to produce witnesses to prove when, how and why Mr. Hutchison got into that ventilator shaft.

You will recall in that respect that I put Mr. Simpson on the stand and I asked him if more than three years ago he had been furnished with the names and addresses of all of the members of the crew, and he said he thought he had. That testimony is proof of the fact that the plaintiff did get the names and addresses of every member of the crew.

They have taken the depositions of two of them, Amundsen and Kalnin. Kalnin testified there were four men, in addition to Mr. Hutchison, in that hold on the morning of April 24, 1951.

Under our system here in the Federal court a deposition of a witness may be taken on written interrogatories. That [670] means simply that the lawyer representing the party in his office dictates to his stenographer a series of written questions. It is a very simple matter to procure an order. It is issued pro forma. You don't even have to worry about it. It is an order signed by the judge appointing a certain notary as a commissioner. If the witness happens to live in Philadelphia or Timbuctoo you appoint a notary as a commissioner. All you do is send the written interrogatories to the notary.

The witness either appears voluntarily or you get a subpoena issued from the court where he lives, take his deposition at that place. He has to come in and he writes out his answers to those written interrogatories. No lawyer is necessary at all.

So that we have evidence here there were four other men in that hold besides Mr. Hutchison. That means there were three in that hold besides Mr. Amundsen. If the plaintiff really believed that she could prove that Mr. Hutchison left that hold at 11:00 a.m. and nobody ever saw him after that and wanted to make it certain, the other three men who were working down there were available, because when you prove that a man is alive, the presumption is that he remains living until somebody proves he is dead.

Therefore, the presumption in this case is that the other three seamen, who were down there in the hold with Mr. [671] Hutchison that morning, are still alive.

We introduced in evidence the Shipping Articles, which give the names and addresses of the A.B.s who were signed on the Articles. Those Articles, under the law, are required to be filed with the Shipping Commissioner when the voyage is over. So that the Shipping Articles weren't something we could hide or cover up. All the plaintiff's attorney had to do, to find out the names and addresses of all of these men, would be to get a copy of the Shipping Articles, the same as I have got, a photostatic copy here. But they didn't do it.

Now, Mr. Simpson will say, "Well, they didn't do it, the defendant didn't do it."

My answer to that, ladies and gentlemen of the jury, is so what? Whose burden of proof is it? Who is under the burden of proving when this accident happened and how it happened and why

it happened? It rests throughout the trial of the case upon the plaintiff.

So much for depositions by written interrogatories. Let's talk about this so-called place of work. I will try to be realistic and practical, which is sometimes hard for a lawyer, as you know.

But what was the place of work in this case, under the evidence? The only testimony about the location of the place where any work was done by anybody was down in hold No. 3. Mr. Kalnin says it was on the deck called the shelter [672] deck, which is immediately below the main deck. That was the only place where there was any work done.

To call the masthouse a place of work is purely an error. The deck of the masthouse, between the door and the ladder, was a route or means of getting to the place of work. The ladder going down the escape shaft was not a place of work. There isn't one word of evidence in this record showing or from which impartial sworn judges could find that Mr. Hutchison did one tap of work in the masthouse or in the ventilator shaft or in the escape shaft.

Now, I contend that common sense dictates that the deck of the masthouse and the ladder were merely a means of getting to the place of work. But the evidence shows that the masthouse and the ladder were not the only means of getting down to the deck below or from the deck below up to the main deck.

There is no evidence whatever in this record showing that Mr. Hutchison was under any compul-

sion whatever to use the ladder in the masthouse, either for the purpose of going down or coming up, because the testimony of Kalnin shows that the after part or after section of hatch No. 3 had been removed, and that there was a ladder there, attached to the after hatch coaming.

I have in mind the fact Mr. Amundsen testified the hatch was closed. But how in the world, ladies and gentlemen [673] of the jury, could the dirt slings be lifted out of hold No. 3 by Mr. Kalnin standing at the winch, unless the after section of the hatch had been taken off, the hatch cover? You just don't lower a dirt sling down through this hatch cover and then pull it up. You have got to have an opening there, so that common sense tells us that when Mr. Amundsen testified that hatch No. 3 was closed he was mistaken.

That is all there is to it, because you cannot use winches on a ship to lower a dirt sling and pull it out unless there is a hole there through which you can do that, and I don't see how any impartial sworn judge could find that the after section of hatch No. 3 had not been removed, as Mr. Kalnin said it had been removed.

So that Mr. Hutchison had a free choice. He could come up the ladder at the after end of hatch No. 3 or he could come up the ladder in the escape hatch and so could all the rest of them. I have in mind Mr. Kalnin's testimony, when the winch is in operation, that is, when the winch falls the cables are lowering a dirt sling or pulling one out and the men don't want to use the ladder at the after end

of the hatch because there is danger of getting hit.

But you know, as well as anyone, that when men are down in the hold of the ship cleaning up a hold, it takes time to fill the dirt sling sufficiently full so it is worthwhile to pull it out. You are not taking it out in scoops or in ice [674] cream cones or in pint buckets, or anything of that kind.

It just—let's be practical about it. You have got a big sling, canvas or whatnot. You remember Captain Crawford testified on that subject. So that the winch wouldn't be in operation and wouldn't be lifting anything out until a dirt sling was filled up. And when it is pulled out, where do they put it? They wouldn't dump it on the deck of the vessel, because it is dirt. They would probably put it out on the dock.

I am sorry I said that. I don't know where they put it. I want to argue only the evidence to you. I don't know where they put the dirt. I withdraw my surmise they put the dirt out on the dock.

In any event, they took it out of the hold and put it some place. That would take some time. Between even lowering and raising of a dirt sling, isn't it obvious that the winch would be quiet? They are not going to pull it out, unless it has something in it, and they are not going to put it back unless it is empty.

So that during the intervals, when the winch is not in operation, there is no possible reason for not using the ladder at the after end of the hatch to do it.

Likewise, when they knock off the testimony

shows they all knock off. When the sailors down in the hold knocked off, Kalnin knocked off, too. He said, "We knocked off at [675] 10 minutes to 12:00. We knocked off at 10:00 o'clock." So somebody is operating the winches when they knock off and so anybody that wants to come up the ladder at the after end of the hatch No. 3, he can, and then he can go down that way until they are ready to use the winch again.

That is of importance here, or, at least, of some importance for this reason: We have five experienced, able-bodied seamen; maybe a couple of ordinaries. Amundsen, I think, said something about a couple of ordinaries.

In any event, you had five men down there who had been making their living at sea; they were seamen. Amundsen was an able-bodied seaman, Mr. Hutchison was an able-bodied seaman.

Those men, with all of their experience, voluntarily and without any compulsion whatever, without any order to do so, used the ladder in the masthouse to come up and go down. Kalnin said maybe some of them went up the ladder at the after end of the hatch, but those who used the escape shaft ladder used it because they were convinced by their own experience that it was safe to use.

They saw nothing about it which indicated to them or any of them that it wasn't perfectly safe for them to use. And I say that because if they had seen anything wrong with it, they wouldn't have used it.

Now, with reference to the degree of visibility

in the [676] masthouse on April 24, 1951, which is the important date, what have they proved? What witness testified that there was anything whatever the matter with the visibility actually in the masthouse when this vessel was at Baltimore, Maryland, on April 24, 1951? That is the date when they claim Mr. Hutchison fell down that shaft.

When they took Mr. Kalnin's deposition, they didn't ask him a single question about the condition of visibility, degree of visibility in the masthouse, or in the shaft where the ladder was; not one single question.

When they took Mr. Amundsen's deposition, they did not ask him one single question and he gave no answer to any question read to you with reference to the degree of visibility in the masthouse on April 24, 1951.

Now, one single question. They make a big point out of the proposition that there was no permanent electric light fixture inside the masthouse. Well, let us use a practical example. Suppose you go home tonight, you go down and get on a bus at 4:15. We will say it is broad daylight, and you walk in the bus and you are looking down the aisle and because you—if you don't look down at the floor, you step on a banana peel and you fall down; you hurt yourself. So you sue the bus company.

And your attorney makes a big point out of this proposition: We will assume there are no electric light bulbs in [677] the bus at all. Can you tell me what difference it would make in broad daylight? It seems to me, as a matter of everyday common

sense, which even a 10-year-old kid would readily grasp, that it is unimportant whether there are or are not permanent electric light fixtures inside of anything, in the absence of some legal evidence showing that the actual degree of visibility within the place at the time in question was such as to make it necessary to have a substitute for whatever natural light there was.

They ask you to find, under oath as judges, upon the evidence which has been introduced here, that that masthouse at the time or immediately before the time Mr. Hutchison fell into or got into the ventilator shaft was so dark you couldn't see your hand before your face two feet away.

Where, I ask you, is the evidence of it? What witness has testified that on April 24, 1951, at Baltimore, Maryland, you couldn"t see everything inside that masthouse with clarity and ease at any time between 8:00 a.m. and 3:00 p.m. on that day? What witness has told you that the door was closed at any time between 8:00 a.m. and 3:00 p.m.?

Mr. Amundsen, their witness, under oath told you he opened the door to the masthouse. And then came up at 10 minutes to 12:00. There is no suggestion here that anybody had to open the door to get out of the masthouse.

They went back down at 1:00 o'clock, according to [678] Amundsen. He didn't say when his deposition was taken, and they didn't dare ask him, evidently, because they wanted to keep that thing in a rather nebulous state, but he didn't say they had

to open it again, and you don't have to open anything unless it is closed.

You can see that that is a heavy door, a heavy steel door. The ship is tied to a dock. The log shows that the weather was practically perfect.

Now, I suggest to you ladies and gentlemen of the jury that the request made of you to come back in here and tell all of us, under your oaths as impartial judges, that you can find in the evidence here a foundation for saying that at the time or immediately before the time Nathanael Patrick Hutchison got into that ventilator shaft that masthouse door was closed, no light was coming in through the ventilator cowl, and that was the condition that existed at the time he got into it or fell into it.

Can you do that? Can any one of you tell me what witness testified to any fact from which you can say that masthouse door was closed and that the thing was dark?

Now, we are not all alone in this thing. You and I and Judge Tolin and Mr. Simpson and Mrs. Hutchison own that vessel. The evidence shows that it is owned by the United States of America, Department of Commerce. It was built by the United States of America, Department of Commerce. The evidence shows it was built in 1945.

Now, we know from the evidence here that a good many of those Victory ships were used during the war, the last war, with many seamen on them, and went to many ports.

The Government has never gotten the idea there

was anything the matter with the inside of that masthouse. The Government has never gotten the idea that there was any necessity for any permanent electric light fixtures in there.

The Government knew on April 30th and on May 1, 1951, that Nathanael Patrick Hutchison had been found at the bottom of the ventilator shaft on this vessel. The evidence here—excuse me a moment.

May I take time out, your Honor, to get another coughdrop?

The Court: Yes. Do you want a recess?

Mr. Gallagher: No. I would like to finish this, if I may.

The Court: When you want one, let me know.

Mr. Gallagher: All right. I will wait for that until we get the recess.

Here is Plaintiff's Exhibit, excerpts of part of the log book. Now, we get the entries under April 30, 1951:

"10:45 Unidentified body found in bottom of No. 2 after port ventilator trunk by M. L. Overman, Chief Electrician. Police notified. 11:00 Phila- [680] delphia City Police aboard, Waldron No. 3898, Wagon No. 262, Sixth District."

I am going to skip down here to 1700, "W. R. Sayer, Lieutenant Commander, U. S. C. G."—obviously United States Coast Guard — "Merchant Marine Investigating Unit, aboard investigating death of Nathanael P. Hutchison, deck maintenance."

Lieutenant Commander Sayer was there for two

hours on April 30th. He was not interested in the outcome of this case. What do you think he was there for? Do you think it is unreasonable to assume that a Coast Guard officer goes on board a vessel for the purpose of conducting a thorough investigation, to find out what was the cause of a death?

Now, the evidence shows that Lieutenant Commander Sayer conducted a further investigation on May 1st or May 2nd—May 1st, I think it was—May 1, 1951, where Kalnin testified under oath. That is where we got the excerpt, I used in cross examination of Kalnin, to refresh his recollection about the fact that he had seen him in the messhall during the noon hour on April 24th, and that at that time he formed the conclusion, unfortunately, the man had a slight hangover. In any event, you have that investigation.

In the light of that investigation, in the light of knowledge on the part of the Coast Guard, United States Coast Guard, charged with the duty of inspecting ships yearly, not [681] one single change was made in the SS Linfield Victory, not one single change in that masthouse.

There you have experts who are there for the purpose of safeguarding people who are on board the vessel. And the vessel is now relicensed. It is being operated by us. I say "us" because we, as citizens, own a piece of it. We have got an interest in everything that the Government owns.

Now, when Lieutenant Commander Sayer conducts a 2-hour investigation on April 30th, don't

you think he talked to everybody on board the ship? Don't you think he looked at everything? Isn't it a presumption that official duty is regularly performed?

And in the absence of evidence to the contrary, can you say that Lieutenant Commander Sayer came aboard the vessel, just went into the captain's quarters and someplace, and had a few highballs and left the vessel, or do you give him credit for being a decent, conscientious man, one who performed his full duty?

So with knowledge of the fact that a man, that the body of one man has been found in the bottom of one elevator shaft on one Victory ship, the Government, through the Coast Guard, doesn't make any change in it. The Government officers are of the opinion that there is absolutely nothing wrong with that masthouse. That it is perfectly all right for any seaman to use. Otherwise, the Government would [682] insist on changes being made.

Could we recess now, your Honor?

The Court: All right. We will take our afternoon recess.

(Short recess taken.) [683]

The Court: The jury being present, you may proceed.

Mr. Gallagher: Thank you, your Honor. Now, with reference to this question of visibility, they put on Mr. Wise, one of plaintiff's attorneys, and you recall that Mr. Wise was up there at Portland when they took these pictures.

Now, Mr. Wise is a lawyer. And Mr. Wise knows,

as a lawyer, that if a witness willfully and falsely makes any statement which relates to a material fact in issue in any case, that witness is guilty of perjury.

I laid that foundation with Captain Dyer. You recall I said to him, "Captain, do you realize that this vessel is now in the possession of the United States Government?"

"Yes."

"Do you realize that your testimony with reference to the visibility in that masthouse is a material fact in this case?"

And he said, "Yes."

And he testified under oath, as you heard him, that in the middle of August 1955, the vessel was exactly the same in so far as that masthouse is concerned as it was in April of 1951, and that with the door open it was light enough to read a newspaper, without any artificial illumination of any kind or character in the daytime.

He also told you under oath—and if this is untrue he can be sent to jail for perjury—he told you that this [684] ventilator cowl, with the door closed, and with the after hatch cover of No. 3 hold off, there was enough light in there for him to see the pipe railings and the two holes in the deck.

Now, when a man lays a foundation like that he never could say that he was mistaken about it. He couldn't say, "I didn't know it was material."

The Government has that vessel and the Government has a District Attorney who prosecutes for perjury. And with that knowledge, you saw the

kind of a man Dyer is. He is not going to stick his neck in a noose. There is no reason for him to do it.

He swore positively with reference to that degree of visibility, and I suggest to you that that kind of testimony is very strong. It is very creditable.

Now, Mr. Wise, you remember he wouldn't say under oath that standing outside of masthouse No. 2, without any artificial light in there at all, with the door open, he couldn't see everything inside clearly. He hedged a little bit. He said, "Well, you know, you can see generally," and so forth.

The important thing is he didn't give any negative statement. He didn't say you could not see in there with ordinary eyesight, without any illumination of an artificial nature. He would not go that far, because he knew the rule.

Now, Mr. Hutchison went down there on May 27, 1951, with [685] Mr. Simpson. Mr. Hutchison testified with the door partly open there was plenty of light in there, as long as it was daylight. He gave testimony with reference to both the door being open and closed.

Mr. Hutchison—were you shaking your head no?

A Juror: Hutchison?

Mr. Gallagher: Mr. John Hutchison, the brother. You know, we read his deposition.

A Juror: Was that '51 or '52?

Mr. Gallagher: May 27, '51. Mr. Hutchison and Mr. Simpson went aboard the vessel Linfield Victory; no testimony about any artificial illumination whatever.

Now, the plaintiff's attorneys were not hesitant

at all about getting on the stand under oath, when they wanted to prove that a floodlight was used to take certain pictures. If Mr. John Hutchison didn't know what he was talking about, there is another witness right there who was with him.

And there is one thing about this argument, ladies and gentlemen of the jury, I want to call your particular attention to. I say here that there isn't anybody in this courtroom who will get on that witness stand under oath and testify that he was on board the Linfield Victory, and that there was any door through which any light could have gotten into the inside of that masthouse, excepting the one single door, and perhaps an open door from the hold to the bottom of the [686] ladder shaft. Nobody in this courtroom will dare get on the stand and make any such statement.

I have been in the masthouse, and if the plaintiff would like to reopen her case, to permit anybody in this courtroom to get on the stand and swear under oath that there was any way for any light to get inside that masthouse, excepting through the ventilator cowl, excepting through this one single door or excepting through the bottom of the escape shaft, when the hatch is off and the door is open, they are welcome to reopen the case and I will tell you ladies and gentlemen there isn't anybody in this courtroom who dares so to testify under oath.

The reason I will call your attention to that is this: Mr. Simpson went to great pains to lead you in the right path, by telling you that Mr. Castle, when he said that with proper illumination or with

the doors—plural—wide open there was plenty of light in there and it was a safe enough place to work. You remember that?

He said with the doors, intimating to you that there was another door out here (indicating). He said, "You see, all these doors——" intimating to you that one of these other doors being opened would aid the illumination in the masthouse.

Ladies and gentlemen of the jury, that is a false lead and you don't hear anybody asking leave to reopen the case to [687] testify to it, either. So that when Mr. Castle said under oath, this lady's son-in-law, that with the doors—with the door—doors—call it doors, obviously means door—with the door wide open it was a safe enough place to work, that ruined their case. On their contention that the masthouse was not a reasonably safe place in which to go down to work and from the—or even a safe place to work, because Castle said with the doors open it was safe; that ruined their case.

It is quite obvious that Mr. Castle was referring to the singular door, because all the rest of the testimony shows that, for example, Mr. Hutchison, John Hutchison, when he was down there with Mr. Simpson, he said he closed the door, didn't he? One door.

He said when he did that it was so dark in there you couldn't see your hand in front of your face. And I hope that you are not going to follow that type of lead, and I don't think you will.

None of us should permit our sympathy—we all have sympathy for the widow — if anybody here

wants to give her a hundred dollars, I will match you, but we are not here for that purpose. So that I ask you not to let your sympathy or your emotions or your heart influence you in making any finding of fact, because, after all, you have a solemn duty to perform. Let the chips fall where they will.

This is not a workmen's compensation deal. This is a [688] case where the plaintiff has to prove negligence on the part of the defendant, as alleged in her complaint.

Now, some more about this light business, if you haven't had enough already. Of course, you can't tell me, and I can't take a chance on not talking about it.

It is too bad that jurors can't say, "Hey, we have had enough of that. Why don't you go to something else? I am with you on that. Please quit." But you can't. You are in an unfortunate position. When you get a lawyer who hasn't got brains enough to know when to stop talking, you have to sit there and listen to it, and that is unfortunate. I wish we could see into your minds to see what you think is important.

Now, they talk about the fact Mr. Webb said it was necessary to put illumination in there to do part of their survey. That is easily understood. Part of their survey was to measure the distance from the deck down to the bottom of the shaft.

Now, obviously, if you are going to be meticulous and put a tape down there you want to know exactly when it touches the bottom, so you have to have some rather good illumination down there at

that point to enable you to know when the end of the tape hits the bottom of the shaft.

But take Mr. Wise, go back to him. They put him on. He refused to testify that standing outside of that [689] masthouse, with the hatch covers closed as they show in these pictures, he could not see the inside of that masthouse. That he could not see the holes in the deck, that he could not see the ladder and that he could not see the pipe railings.

He would not testify to those negative things, because he knew, as well as Captain Dyer does, this ship is a physical object which cannot be changed. You could demonstrate, by taking a jury to that ship in a criminal case, and letting them stand outside that masthouse with a door off and everything else closed, whether it was good or whether it was not good visibility in there. That could be proved to the point of demonstration, which you don't get very often in criminal cases even.

So you have to be careful when you are dealing with physical facts and ships, unless the ship sinks between now and the time the grand jury meets, or something, or the time such a trial happens, God willing it don't.

It is a good vessel. It has been at sea for a long time, so it will be there. So you don't take any chance monkeying with that kind of business.

None of you would testify this railing is steel, would you? Because it can be demonstrated it is not steel. You wouldn't testify that this hatrack is not here, because it can be demonstrated that it is.

Now, we have another example of the fact that it

was [690] perfectly safe to work in that masthouse. Somebody rigged that floodlight. Who did it? He had to work in the masthouse to do it, didn't he?

So it evidently was perfectly safe for whoever went in there and rigged that floodlight that Mr. Wise told you about. He didn't say the man had to use a flashlight to get in there to find out where to put this ladder or how to string this floodlight.

I hope I have said all I need to about that light. No, I haven't. I have to take that back. Amundsen testified that he saw—this is their deposition, remember,—he saw Mr. Hutchison's body in the bottom of that ventilator shaft at Philadelphia. Remember this is their witness and, ladies and gentlemen of the jury, there isn't a word in the complaint which says anything about light or lack of light; not a word.

All they say in the complaint is that the defendant neglected and failed to furnish safety appliances in and about a ventilator shaft, to provide a reasonably safe place to work. They don't say anything about lights not being in there.

If that was their theory, when they took Amundsen's deposition, why didn't they ask him what the visibility was? They do ask him if he saw Mr. Hutchison's body down in the bottom of that shaft at Philadelphia, and he said yes.

They didn't ask him if it was necessary to have any [691] artificial illumination to do so and Mr. Kalnin also saw the body down in the bottom of the ventilator shaft. He wasn't asked if it was necessary

to have artificial illumination to enable him to see the body down there.

If they are going to try to prove these things, why don't they ask somebody who is there at the time when they have a chance to do so, instead of just coming in with some theory?

And besides that, you have seen doghouses, haven't you, with these—I don't mean the ones the husbands get in, but rather doghouses out in the back yard. Take a doghouse big enough for an Airedale, we will say, and with a hole just big enough for the Airedale to get in, as is usually the case.

If the dog had your shoe in the doghouse, do you think it would have to have a flashlight to find it, if it was out in the back yard in broad daylight? If you went out to the doghouse, don't you think you could see throughout the breadth and length of the floor of the doghouse?

That may be a poor example. This door on the masthouse is certainly big enough in broad daylight, if you pay any attention to the laws of physics or the diffusion of light, to permit anyone to get in that masthouse, to permit him to do anything he wants, from reading a newspaper on up to anything else, and on down to anything else.

According to Mr. Kalnin's testimony, their witness, seamen and longshoremen used that ladder constantly. There is [692] no evidence any of them ever got hurt. If it can be used constantly, not only by seamen, but by longshoremen, what is the matter with it?

Mr. Wise didn't think there was anything wrong

with it, because he went down. He is not even a seaman. They want you to indulge in a presumption which, I think, the court will tell you exists. A presumption is whenever any man's lips are sealed by death the law presumes, in the absence of evidence to the contrary, direct or indirect, that such person exercised ordinary care and ordinary prudence.

Let me ask you this question: Would any ordinarily prudent seaman walk out of the deck of the hold, through a door, and climb up a ladder, when, upon looking up, he would see what they want you to believe, that the place was pitch-dark? Would an ordinarily prudent person do that? Would you do that?

Suppose you had a free choice of going upstairs in your house or somebody else's house, and you opened the door to one stairway and you look up, and you look up and it is just as black as the inside of a tunnel, with doors on both ends. You know there is another stairway and you take a look at it and it is perfectly light. Which one are you going to choose, if you are an ordinarily prudent person?

So I suggest to you that if you presume, as they want you to, that Mr. Hutchison was being careful about what he [693] did, how can you find, how can you find as jurors and impartial judges that he goes out there and, naturally, you look up. If it is so dark you can't see, you look up and you are not going to climb up there, are you?

Of course, that gets back to that 11:00 o'clock story, and I think we have conclusively nullified that, that this accident happened at 11:00 a.m.

There are other ways in which you could know what he had been doing, maybe. How was he dressed when he was found? Was he dressed in working clothes or in street clothes?

Talk about the burden of truth. You want to be satisfied that your verdict is just, if you bring in one against the defendant, don't you? It is up to them to give you enough evidence to make you fairly certain you are not making a serious mistake, because any mistake you make cannot be corrected.

Under our system if one witness testified to one thing and that one thing would be legally sufficient to support a verdict, and 150 witnesses testified to exactly the opposite thing,—this may seen strange to you, it seems strange to some lawyers, too, but, nevertheless, it is the rule—if a jury adopts the testimony of that one witness and renders a verdict in favor of the party whose contention is supported by the testimony of that witness, there is no appellate court in the United States would upset that verdict. So you have [694] a tremendous power, and having a tremendous power you also have a tremendous duty.

Mr. Simpson, I think,—I am not saying this positively—you have got 12 minds there and I want you to recall this for yourselves: Did Mr. Simpson tell you that Mr. Dyer had testified that there was a screen blocking the ventilator shaft on the starboard side of masthouse No. 2? Did he say to you they should have put the same kind of a screen in the masthouse on the other side, on the port side?

If he did, listen to this: Here is Dyer's testimony. The reporter wrote it up.

"Part of Cross Examination of witness Dyer by Mr. Simpson:

"Q. Directing your attention to Plaintiff's No. 4, I am going to ask you to step down and point something out to the jury, if you will.

"I call your attention to Plaintiff's No. 4, which has been identified as the starboard side of the masthouse of the Linfield Victory, and I ask you if you can tell me what this is starting up here, Captain (indicating).

"A. That is a reel for a heavy lift——"

That is this thing here, I think (indicating). That is what Dyer pointed to, as I recall it.

"Q. I misled you. I mean from the very top."

Up here (indicating). [695]

"A. This is the cowl for the starboard ventilator shaft.

"Q. As that ventilator shaft goes down, how far does it go down in the Linfield Victory?

"A. Down to the lower hold.

"Q. The same as the one on the port side?

"A. The same."

Now, that answer doesn't mean that the ventilator shaft on the starboard side is the same in construction and design as the one on the port side. It simply means that the ventilator shaft went down to the lower hold on the port side, as the ventilator on the other side went down.

"Q. Looking in here, is there something which blocks that off or not?

"A. Yes; bulkhead. This shaft is not like this one here (indicating)."

Captain Dyer said "this" and he was pointing to this one here (indicating). "This one," to wit, the starboard, is not like this one here (indicating), the one on the port side.

"Q. Plaintiff's No. 1?"

That is the next one after this transcript says the answer was, "This shaft is not like this one here (indicating)."

The question is, "Plaintiff's No. 1"?

See (indicating)?

"A. This is not available from this end—— [696] starboard shaft is not available.

"Q. Captain, in your experience have you ever at any time seen a screen or a grate of any kind over a ventilator shaft on a Victory ship?

"A. Do you mean over the head of the shaft or over——"

And then the reporter didn't write any more of it.

You look in here and you don't see any opening at the deck level in the starboard side (indicating), but that is not the point in this case. The point is whether this one is a reasonably safe protection for a sober individual, in the full possession of his faculties and exercising ordinary care.

Watch what the judge tells you. Ask the judge if you have any doubt about it, whether the defendant owed any duty to make this thing safe for a man who was not exercising ordinary care for his own safety. If you have any doubt about it, you are entitled to and you should ask the judge that question.

Of course, we all know that nothing can be made

so that it is utterly impossible for anybody to get hurt. As a matter of fact, if you wanted to develop that to its ultimate, if they hadn't built the Linfield Victory Mr. Hutchison would never have been on it. If he hadn't been on it he wouldn't have been injured. If he hadn't been injured he wouldn't have [697] died. But that is not so simple as that.

Would any reasonable man anticipate—put yourself in this position—you never heard about this accident and you own a ship, you own the Linfield Victory and you go there, you know men are going down that ladder and coming up it, would you before this accident happened, and without ever hearing of any similar thing, have anticipated that some member of the crew in broad daylight, with the door open, would be likely to fall into that ventilator shaft with this pipe railing proceeding it? If so, indict the United States.

Look at the ship, around the edges of all of the decks are pipe railings. Keep in mind the fact that seamen are required to walk along those decks on the outside. Men have to maintain watches in stormy conditions, lots of times from the bridge.

Here you have got those pipe railings along the edge of the deck, above the main deck. The only thing that would keep a man from falling overboard, if you look here, you will see pipe railings along the starboard side of the deck, aft of the house (indicating), the deck immediately above the main deck. You can see the same thing at the very top here (indicating), up in the flying bridge.

Now, would you anticipate before the accident happened that a man is going to fall down that

shaft, if he is in the full possession of his faculties and he is perfectly sober [698] and he is exercising ordinary care, particularly, ladies and gentlemen of the jury, a man who had actual knowledge of the physical situation, because he did come up at least once before and went down at least once, because Amundsen said they came up that way for coffee and went down afterwards. So Mr. Hutchison on the morning of April 24, 1951, had used that very same thing and knew exactly what it was like.

Now, with reference to this Coast Guard certificate, I want to call this to your attention because this is issued by your representatives, mine. We have Congress and Congress passes laws. The laws require the Coast Guard to inspect vessels for safety. The Coast Guard is required to issue a certificate, if the vessel is all right, and not otherwise. And here it is for this particular vessel, issued 17 July, 1950, and expires 17 July, 1951. "Subscribed and sworn to before me this 28th day of July, 1950," and so forth.

Here is what it says up at the top:—I am not going to read it all——

"I hereby certify that the said vessel was built at Portland in the State of Oregon in the year 1945; rebuilt in the year blank; that the hull is constructed of steel; is provided with blank staterooms, blank berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection [699] laws and the rules and regulations prescribed thereunder; and is allowed to

carry blank passengers, 12 persons in addition to the crew," and so forth.

"The said vessel is permitted to be navigated for one year on the waters of oceans."

Now, then, there are certain particulars which are set forth in the certificate, but if you have any doubt about it, ask the judge whether the law enacted by the Congress,

"* * * provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each such steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, and has suitable accommodations for the passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, holds, life preservers, floats, anchors, cables and other things are faithfully complied with."

Ask about that part if you have any doubt about it. Ask his Honor if the law does not also provide that, "When the inspection of a steam vessel is completed and [700] the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by both of the Coast Guard officials signing it, before the Chief Officer of the Customs of the district or any other person competent by law to administer oaths."

In other words, the United States Government requires these inspectors to be so careful in their

inspection that they swear to it under oath, and if it is not true that is perjury.

So we have got the certificate. You have got the evidence that that particular vessel and all the other victory ships, which are owned by the Government and operated by Pacific-Atlantic, or owned by Pacific-Atlantic are inspected every year. They are inspected, not by the inspectors in Portland only, but in Seattle or every place the vessel happens to be when the certificate expires, so that these vessels, all being the same, are approved throughout the various ports in the United States by men whose sworn duty it is to see to it, with their experience as seamen, that everything about the vessel is safe and that it can be used with safety to life.

Now, that is of no moment whatever. Mr. Simpson tells you that. Or he probably will tell you that doesn't make any difference. No. [701]

The fact that the impartial Coast Guard officials, seamen, trained, inspect the vessel and approve it throughout, he says that is nothing. I think it is something. I think it is quite a bit.

And Captain Dyer told you that he knew, and he couldn't know excepting by observation, that these inspectors inspect these vessels throughout. They inspect the masthouses. They inspect these ladders. They inspect the whole business. So there is the evidence which you have.

Now, ladies and gentlemen, and because of remarks that have been made when you were not present, Mr. Simpson may refer to the notations in the log about April 25th and April 26th, where Mr.

Hutchison was marked A.W.O.L. this day. And he may attempt to convince you that the fact that the A.W.O.L. was there would indicate that Mr. Hutchison was an employee of the Pacific-Atlantic Steamship Co. on those dates.

Well, we know that is impossible, because they don't contend he was alive on the 25th or the 26th of April, and death terminates all such personal contracts. But, in any event, A.W.O.L. means absent without leave, so that any person, even if he is your employee, if he is absent without leave he is not acting in the course of his employment, is he?

That is a thing to remember. No. 1, was he actually an employee of the defendant from 12:30 p.m. on April 24th. [702]

No. 2, if you say he was on April 24th, after that, actually an employee, then was he acting in the course of his employment? There is no evidence that he went near this masthouse during those hours. When he got in there I don't know. I don't know whether you know.

If you had to say that Mr. Hutchison got in that masthouse on a specific date and a specific time, can you do it from the evidence? Can you say, under your oaths as jurors and as impartial judges, that Nathanael Patrick Hutchison got in that masthouse at 3:35 p.m. on April 24, 1951, or at any other particular time?

Now, if you can't say that, how can you say that when he got into it he was acting in the course of his employment?

I want to discuss the medical testimony with you.

Let's start at the beginning. Who had the very best opportunity to know how long Mr. Hutchison probably lived? This has only to do with their claim that he suffered conscious pain and suffering, because if that got in here it wouldn't make any difference how long the unfortunate man lived, from the time of his injury up to the time of his death. We will have to discuss it, because the judge is going to submit it to you for decision.

Dr. Glauser opens the man's head up, he opens his chest up. He is the man who sees the clot of blood.

He is well trained, according to his qualifications. He [703] hasn't been treating dead people—I mean, he hasn't devoted his professional life to dead people only. He has been a Commander in the United States Navy and he was in the South Pacific, according to his deposition, and he was, I think he said he was, an instructor or professor in surgery, and he had been in general surgery, and so forth.

Here you have a man who, on the surface of his testimony, under oath in the deposition, is well qualified. He says he opened up the skull and he says he saw the subdural hemorrhage, and he says he saw the fracture of the skull. And he says he, from what he saw in there, was of the opinion that the man couldn't possibly have lived for more than an hour.

Now, I respectfully suggest to you that he is in the best position to know. And when a witness has the best opportunity he is the most reliable.

That doctor also put something else in, which is

of considerable importance, because you know what a coroner's inquest is. You have heard about them.

A coroner's inquest is had when a death results from accident or when somebody dies in the house without any doctor around, and nobody knows what the cause was and they can't get a doctor's certificate.

But when there is an accidental death, somebody has been killed as the result of injuries, the coroner's part of the deal is this: It is the duty of the coroner to get evidence [704] and investigate for the purpose of giving it to the prosecuting officials, if there is any evidence that negligence on the part of anybody proximately caused or proximately contributed to the death, because you don't have to be guilty of murder in order to be prosecuted. You can be prosecuted for manslaughter, and if you are guilty of ordinary negligence, lack of due care and circumspection, and that kind of negligence on your part results in the death of another human being, you can be sent to San Quentin, because that is manslaughter, and that is a felony. That is the object of the coroner's inquest.

You haven't heard of anybody being convicted of manslaughter. The captain wasn't convicted of manslaughter. He hasn't been prosecuted. So that they want you to say that this captain should have known his man was in this ventilator shaft, where nobody expected him to be.

They should have taken him out. And then what is the evidence about what they would do with him? I don't know whether any of you may have been in

Baltimore or not. Even if you have, you can't decide this case on the basis of what you know. Let's say, for example, that you know, from having been in Baltimore, there was a hospital right next to the dock and that your brother was a neurosurgeon and that you telephoned to him to find out if he was there April 24, 1951, and he said, "Yes, I was there." You couldn't decide this [705] case on that kind of knowledge, because that is something you get out of the courtroom, and it is not evidence.

Now, I have never been to Baltimore, so I don't know, of my own knowledge, what the hospital situation is. If you are a judge, you take the evidence which is offered in the courtroom.

Now, on that basis, where is there any evidence there was even a hospital operating room available for use during any time when an operation might have saved this man's life? Where is there any evidence in here showing the time when he got down into that shaft and struck his head? Where is there any evidence showing how far the nearest ambulance, nearest available ambulance, was at any time immediately after and from the time of the injuries?

Where is there any evidence showing how far the ambulance would have to come to get to the ship? How far it would have to go to get to the hospital and where is there any evidence here showing that there was available at any time, when such service might have done this poor man some good, a neurosurgeon? There just isn't any.

Now, who would be the man most likely to sus-

pect that Mr. Hutchison could have been in the ventilator shaft, if anybody, any reasonable person was supposed to have suspected it and looked into it? The men who were working with him in the morning. They knew what the entire situation was, ladies and [706] gentlemen of the jury. They saw this masthouse, they saw these ladders, they saw these pipe railings. They saw the whole business; they used it.

None of them had the slightest idea there was anything connected with that masthouse that would even suggest the possibility that Mr. Hutchison might be in the bottom of the ventilator shaft.

Now, when those experienced men, who are using the thing, can't see anything wrong with it and can't see anything about it which even suggests that is a possibility and, therefore, they don't look in it, do you think it is justifiable to blame the captain of the vessel as to whom the evidence shows absolutely nothing, excepting that he signed the log on the 25th and the 26th, that Nathanael Hutchison was A.W.O.L.?

The log shows in that respect, also, that—and I think this is of some significance—on the 24th of April, what happened at 1715? "Olive Kupau A. B. reported for duty."

Now, you will remember Mr. Kalnin testified that they looked in his quarters, they looked in the messroom. They didn't find him.

Kalnin says, "We just took it for granted he went ashore," he said, "like sailors do in port."

So they sent for another sailor. There he is at 1715; 15 minutes past 5:00 on that day. [707]

Now, he didn't come back to the ship until 4:00 o'clock in the morning. I wonder if it is Mr. Simpson's contention that if the man was supposed to be back at midnight—you get shore leave, if you need it; you are not given carte blanche.

When he didn't come back until 4:00 o'clock, were they supposed to be looking all over the ship for him at 12:00 o'clock or 8:00 o'clock? Aren't you entitled to rely upon the proposition that, as Mr. Kalnin says, "The ship was in port. A sailor could quit anytime he wants. We just took it for granted that he left."

Now, on that sort of testimony they want you to hold the master of this vessel responsible for not having somebody looking in that particular ventilator shaft. And, in effect, hold the master guilty of this man's death, because if the master was guilty of negligence, in not finding him, or not sending him to the hospital, the master is guilty of crime, so if you find this master negligently brought about this man's death, that is quite a serious indictment.

The corporation didn't kill him. The corporation had nothing to do with it. You act through the master of the vessel; he is the agent.

Now, you have got this doctor situation, and when the doctor said in his testimony he noticed acute dilatation of the heart, why do you think he put that down there for? [708] Keeping in mind the fact that the coroner's inquest, to determine whether there is any criminal responsibility, it is his duty

to find out the cause of death and whether that cause has any criminal connection or anybody can be prosecuted for it. The doctor thought acute dilatation was of importance or he wouldn't have written it down.

Why did he write it down? He didn't say it was the cause of death. If the dilatation of the heart had occurred as Dr. Dickerson wants you to believe, because of some overpumping and so forth, and if the pump had to work so hard that the heart suffered an acute dilatation at the end of this very heavy work, then the acute dilatation would be the cause of death, wouldn't it?

But the doctor didn't say it was. He just put it down. And Dr. Cefalu told you, as I recall,—you know how bad my memory is— I had that lapse this morning about that testimony Mr. Simpson read. But I try to be accurate.

I think Dr. Cefalu said it is within the realm of medical certainty that a living person, suffering from dilatation of the heart which isn't acute yet or even if it is acute, he might have said they could suffer a blackout while alive.

Dr. Lajoie told you the same thing. Dr. Lajoie is French, evidently. He doesn't speak our language as plainly as some others born in this country might, but he is well qualified and there has been no other heart man giving you any testimony. [709]

Dr. Lajoie said there is no connection between subdural hemorrhage and acute dilatation of the heart. And he told you this, which I think should convince you, he said he had watched himself three

or four autopsies here in Los Angeles within the last two weeks in cases involving subdural hemorrhages, and that he was there for the sole purpose of seeing if the condition of the heart had anything to do with the accident or the falls, or whatever it was.

He said in each one of those cases the heart was normal. And, if that were not absolutely true, Dr. Lajoie has stuck his neck right in the noose. He must know it, and he would be on his way to San Quentin in no time, and Dr. Cefalu would be trotted over here and say, "I performed the autopsy on those bodies and the heart was in a state of acute dilatation."

Dr. Dickerson said you get these, that if the heart were forced to overwork and pumped and pumped and pumped and pumped, that dilates it and causes the acute dilatation, which is the overworking of the heart. When it gets to the point where it can't work any more or pump any more, then the man dies.

If that is true, then Dr. Lajoie's testimony is untrue and if Dr. Lajoie's testimony were untrue about the conditions of the heart in cases autopsied in the the coroner's office here, do you think there would have been much delay in having Dr. [710] Cefalu trot right back here to testify in rebuttal?

Dr. Adelstein took the stand here. I want to ask you this question: Suppose your husband, your wife, were unfortunate enough, and let that apply to all of you—wives of the men and the husbands of the ladies—if any one of you had someone near and

dear to you suffer a head injury and there were only two neurosurgeons available to you, in order to try to save the life of that loved one, and those two neurosurgeons were Dr. Dickerson and Dr. Adelstein—and let's say that you knew as much about either of them as you know now and no more and no less—which one would you choose, the man who says he would cut open the skull of your husband or your wife within a half hour, without making these tests that Dr. Adelstein, a careful surgeon, said were necessary, or would you trust your loved one to Dr. Adelstein?

Dr. Adelstein told you, too, that every one of his head cases which dies is autopsied, and he said he had handled subdural hemorrhages. He said that in none of those cases was there any acute dilatation of the heart.

There are other records in addition to Dr. Lajoie's cases. There are Dr. Adelstein's cases and there was Dr. Cefalu over there. He would come on a telephone call with those records, if they disputed that testimony.

Now, I am about finished. I know you are glad. At least, I would be glad if I were in your position. But all I ask you [711] to do is to render a verdict which is the kind of a verdict that any jury should render in any case, from the Latin veredicto, to speak the truth, and to speak that truth from the evidence.

My client doesn't want you to cheat this lady, if she is justly entitled to recover damages and if she

has proved her case by preponderance of evidence, give it to her.

On the other hand, my client asks only for equal justice, that is all. My client doesn't want any verdict rendered against the plaintiff by reason of any prejudice against her or by reason of prejudice against seamen or by reason of any emotion. My client wants you to act as you said you would, as sworn judges, impartially.

A Juror: I have a question, if the judge will permit me to ask it. I would like know—I am a little confused, I would like to get straightened out as to the size of the shaft and the height.

Mr. Gallagher: Are you referring to this (indicating)?

The Juror: No, the second—well, that is all right.

Mr. Gallagher: This one (indicating)?

The Juror: No, the one——

Mr. Gallagher: This one (indicating)?

The Juror: No, the other one, the ventilator shaft.

Mr. Gallagher: This (indicating)?

The Juror: I want to know how wide that shaft is and how high is the rail on it. [712]

Mr. Gallagher: That, I think, can be answered. Here is a drawing made by the plaintiff's surveyor, Mr. Haines. Is that the name?

Mr. Simpson: That is correct.

Mr. Gallagher: I am no——

The Court: Mr. Gallagher, you are speaking so

softly I think the reporter is having trouble getting you.

Mr. Gallagher: All right, your Honor. I will try to—I am not, I don't pretend to be a good plan reader, but as I look at this drawing, here is the pipe rail and this would be the stanchion (indicating). It is 40½ inches from top to bottom. That is, from the bottom to the top, 40½ inches.

The first rail, this one here (indicating), is 20½ inches above the floor. This rail is 20 inches above this one (indicating). Is that clear?

The Juror: Yes, I see that.

Mr. Gallagher: Now you want to know the size of the shaft itself?

The Juror: Yes, please.

Mr. Gallagher: Well, the size of the ventilator trunk, according to this drawing, is this: You see this side of it, the one—(indicating)——

The Juror: Yes.

Mr. Gallagher: That is closest to the deck. [713]

The Juror: Yes.

Mr. Gallagher: That is 34 inches from here to the solid wall (indicating). Then this distance from here to here is 30 inches (indicating).

This distance from here to here is 14½ inches (indicating).

And the distance from here to here is 30½ inches (indicating).

The shaft itself *if* not the same shape as the openings up here (indicating). Each shaft is square.

The Juror: It is not square——

Mr. Gallagher: I thought they said it was 36 inches square.

The Juror: It couldn't be, if it is 14½ inches across the back.

Mr. Gallagher: This is the covering on top (indicating). If you look here at this picture you see this—here is the shaft with the ladder (indicating). That picture, that appears to be a square shaft (indicating).

Here is the ventilator shaft, when you get down from the upper part of it, it also appears to be square.

The Juror: Then how would he get 14½ inches across the back, 30 inches this way and 30½ inches this way—(indicating)——

Thank you. I can tell from the drawing. [714]

Mr. Gallagher: If you can follow this. Let's assume that——

The Juror: This is actually the opening in here, then (indicating).

Mr. Gallagher: Yes.

The Juror: This is not open down here (indicating).

Mr. Gallagher: No, not at the top.

The Juror: Not at the top. That is what I mean.

Mr. Gallagher: You can see here — (indicating)——

The Juror: Thank you. I can tell from the drawing. Thank you. Now I understand.

Mr. Gallagher: This is an exhibit in the case.

The Juror: Also, I would like another piece of

information. Will you please again give me the height and weight of the man?

Mr. Gallagher: 66 inches in height; 165 pounds.

A Juror: May I ask a question, your Honor?

The Court: Yes.

The Juror: What clothes was he found in?

Mr. Gallagher: There is no evidence with reference to that in this record. No testimony whatever on that subject that I can recall. And I looked through these exhibits, and there is nothing in any of these exhibits.

A Juror: May I ask a question?

The Court: Yes. [715]

The Juror: How much money was found? Was that record—how much money was found on him?

Mr. Gallagher: Mr. Amundsen was asked one question about that. I think it was the last question. It was, "was there money found on him?"

And Amundsen said, "Yes."

There was no question asked of exactly how much money was found on him.

I will be perfectly willing to let them introduce the receipt they gave to the coroner for the exact amount of money that was found on him, if they want to offer it.

You have got it.

The Court: You are just making argument. The jury have interrupted to ask you a question.

Mr. Gallagher: I can't answer that question, because I don't know. I wasn't there. I am not a witness, but I am perfectly willing to stipulate to reopen the case so you can have proof of exactly

how much money was found on his body and the widow knows it because she got it.

Now, I submit the case to you, ladies and gentlemen of the jury, asking you to, as I know you will, pay attention to the instructions of the court and decide each question of fact submitted to you upon the evidence introduced before you, the direct or indirect evidence, without any speculation.

We can all surmise about how he got in [716] there. I can surmise as well as you can. I could say, but there is no evidence for it, the man was tired. He had been out all night so he waited until everybody went down in the masthouse, so that the mate wouldn't see him and he went in there and he laid down on the floor here (indicating) in the masthouse and he went to sleep. It is six feet long. That deck is six feet long, and it is plenty wide for a man to lie down on, as you will see from the drawing.

So you can see where Mr. Wise is standing here (indicating) and you can see the open door. Obviously, that deck doesn't stop right here (indicating), the drawing.

Do you have another drawing of this, Mr. Simpson?

Mr. Simpson: No, I do not.

Mr. Gallagher: But I am talking about surmise. If I want to speculate, I would say, well, he went in there and he lay down and went to sleep and he rolled in his sleep and he rolled between the middle railing and the floor of the deck and went on down to the bottom.

But there is no evidence to support that. I couldn't prove it. I couldn't point out anything in the record, excepting the fact that he was down in the bottom of the shaft, and that to me wouldn't justify speculating about that.

Or, I could say, if I wanted to speculate, "Well, somebody followed him in there. He had been flashing the money around and somebody followed him in there and hit him on the [717] head."

If I didn't know anything about whether he had some of that money left or not, then I might speculate that somebody injured him trying to rob him and that they got into a fight and that Mr. Hutchison fell down the shaft. But that is pure speculation.

When you get to figuring out how the man got in there, I ask you not to indulge in imagination or or speculation, because how he got in there is important and why he got in there is important, and the mere fact he got in there is of no importance because the mere fact that he lost his life does not entitle the widow to damages.

The mere fact that he may have fallen, the mere fact he did fall, does not entitle her to damages. They have got to prove that the cause of his fall was negligence on the part of the Pacific-Atlantic Steamship Co. in failing, as she claims, to supply sufficient safety appliances in and about the elevator shaft to provide a reasonably safe place to work.

If all you want to know is whether the shaft is big enough for him to have fallen in—and that is going to be the basis of a verdict—then, of course, what I have said is just like throwing uncooked

beans on the ceiling and expecting them to stick there.

But this is not a workman's compensation statute. I think the judge will so tell you. So that the mere fact that an [718] accident happened, in and of itself, is not enough to establish a case for damages. And the mere fact that the unfortunate man is dead is not enough to justify the rendition of a verdict.

Now, I thank you for being patient with me and, as I told you, let's all say, "Halleluiah, I can't argue the case any more."

Mr. Simpson makes his argument. My mouth is stopped. I couldn't say anything even if I had something to say, which I will not be able to do.

Thank you. That is for listening to me. It wasn't your duty to listen to me, so I will thank you. When you deliberate, be careful, be just and be impartial and don't decide any issue of fact because your sympathy for the widow pushes you that way, because that is not in accordance with our Republican form of government or with the system of jury trials which is provided for the protection of your rights, not only to life and liberty, but property.

The Court: It is so near the adjournment hour the court will not call upon Mr. Simpson for his closing today. We will have it tomorrow morning.

Now, there is one thing I might mention to you jurors. I thought of it from time to time through the trial, and then it slipped by. I thought I would mention it in the instructions, but I might forget it. I have it in mind now, so we [719] will just take care of it.

It it not actually instructions, but there has been during this trial quite a bit of publicity in the papers and radio commentators, and the like, about the fact that in a jury room in the United States District Court in some other district a judge permitted a recording device to be concealed; the jury didn't know it was there.

They recorded all of the jurors' deliberations, without the jury knowing it. And as you have noticed from the papers, there is a great deal of furor about that, a lot of discussion pro and con.

There is a lot of discussion pro and con among the judges. One of the other judges here said he thought it was a good idea. He has heard those recordings. He thinks that it was useful in teaching judges to better understand how juries work, so we might be able to develop better techniques in instructing and in the handling of jury trials.

Now, there are other judges who say it is the most outrageous thing they have ever heard of, and I think some Congressmen are going to introduce bills in Congress which, if enacted, would make it absolutely illegal if, in fact, it is not illegal now.

I want to assure you your jury room is not bugged. No recording will be made of anything that takes place in the jury room. No one will be allowed to listen at the door, to [720] see what is going on in there.

It is a very old principle of American law and of English law that deliberations of a jury are absolutely secret. Generally speaking, it is out of bounds for anyone, other than the marshal, the bailiff, to

have charge and see that the jury is comfortable and their wants are supplied, to even be in the vicinity of the jury room.

And while the jurors may talk about the case after the case is over, you can go out and write articles if you want to and publish them in the papers and talk to your neighbors, talk to anyone, but you don't have to. The individual jurors may continue to treat the matter as secret. You can tell what went on there in the jury room or you can just keep quiet about it.

There was a case one time that tested that principle, where a judge was rather disturbed at a verdict that a jury returned and said, "Mr. Foreman, did this jury consider this?" And he referred to a particular bit of evidence in the case.

This was in England, where they are much more formal than we are, and the foreman got up and said, "We have returned our verdict, Milord. We stand on it."

He said, "Answer my question."

He said, "We have returned our verdict. That is our answer."

The judge said, "You can't talk to an English judge like that. [721] You are locked up until you do answer."

The foreman stood by his verdict and refused to answer, and that case went up through all the courts of England, the courts of appeal, until it finally reached the House of Lords, which is the Supreme Court in England, and they decided the foreman of that jury was within his rights, that

no one, not even the judge of the court, can compel a juror to tell what went on in the jury room and what the jury did and what the jury did not consider.

The court may require a verdict, and that verdict might require the answering of particular questions, but that then is the verdict, and you speak through the verdict and no one can compel you to speak otherwise or to enlarge upon whatever form of verdict the court submits to you.

If you have had any feeling upon reading these articles, if you have read them, just forget it, because we are not going to watch what is going on in the jury room.

You are now excused until tomorrow morning. Is 9:30 too early?

At 9:30 we will have the further argument, which will be followed immediately by the instructions to the jury.

And it is then the usual custom to keep the jury here until you arrive at a verdict, so bear that in mind when you park your cars tomorrow. Don't put them someplace where at 4:00 o'clock in the afternoon you would get a ticket, but [722] wouldn't get one up to then. I think there are some such zones here, where you can park for certain periods of time but not others. If you pick a parking lot, be sure it isn't going to be one that will be closed so you won't have access to your car if you don't arrive by a certain hour, because the deliberations of juries are very unpredictable things. They sometimes take a long time and sometimes a very brief

time. Just come prepared to stay until you reach a verdict.

You are now excused until tomorrow morning at 9:30, and do not discuss the case, do not decide it in your own minds until it is finally submitted to you.

A Juror: You mean, Judge, we might be here all weekend? Should we come prepared to stay?

The Court: It is very unlikely you would be here all weekend. Juries ordinarily arrive at a verdict within the course of a few hours.

But tomorrow morning you have an argument from Mr. Simpson, you have the instructions from the judge and then it is the law that after the judge gives the instructions it is the duty of the attorneys to come up here, out of the hearing of the jury, and indicate to the judge any errors they feel he made or indicate any way in which those instructions should be enlarged upon or corrected. And sometimes that takes a little time. But we will send you to lunch, anyway.

We hope you will take whatever time is [723] required to decide the case and not feel pressed, and still be able to get it decided so that you will be free at a reasonably early hour. Generally speaking, juries are, but they sometimes have to stay here in the evening.

Does that answer your question?

The Juror: Yes.

The Court: I might say, just for your information, keeping a jury overnight is a very rare circumstance. I have been a judge of this court now

for practically four years, and I have only had one jury that did not arrive at a verdict on the day that the case was sent to the jury. That was a case that took, I think eight weeks to try. The jury was out two days. But it is very rare that it takes that long, so we hope you have good fortune and are able to arrive at your verdict within a period of time that will not inconvenience you.

Tomorrow morning at 9:30.

(Whereupon, at 4:00 o'clock p.m., Thursday, October 13, 1955, an adjournment was taken to Friday, October 14, 1955, at 9:30 o'clock a.m.)

Friday, October 14, 1955. 9:30 a.m.

Mr. Gallagher: Before Mr. Simpson commences, I have a request to make of the court.

I would like to reopen for the sole purpose of asking Mrs. Hutchison one question with reference to how much money she got from the coroner.

No. 2, I omitted two important elements I would like to state to the jury. I would like ten minutes to do that, as part of my argument. I ask to open because of the question asked by the lady juror with reference to exactly how much money was found on his body.

The Court: The court has closed the case after asking both of you if you had anything further to offer. It is seemingly unorthodox to open now. After having argued three hours yesterday, I don't see how I can properly exercise discretion to allow further argument.

Now, this matter of the amount of money is a short thing. Of course, the amount of money a person receives from the coroner isn't necessarily the amount of money found on the person of the deceased, who has been examined by the coroner. It might come from other sources, and that fact standing alone wouldn't show how much was actually found on the body.

I don't know just how firm the evidence is, if it is at all, on exactly how much was found on the body. [726]

Now, have you discussed this with Mr. Simpson?

Mr. Gallagher: No, your Honor. It is a presumption that nobody stole anything from him. It is a presumption——

The Court: What might have been in his locker, what might have been in possession of the purser and so on. To go into that now is apt to lead us into extensive testimony and possibly even to the taking of depositions.

The motion is denied.

Are you ready to proceed with your argument?

Mr. Simpson: Yes, your Honor.

The Court: If you do find that you gentlemen are in possession of sufficient evidence that you are able to agree on the amount that was found on the body, that is a different thing. But unless there is some unequivocal evidence here about it, I don't think we should go on with it.

The amount of money a widow received from a coroner is not, as an isolated fact, indictative of what was found on the body.

Mr. Gallagher: I am sure we both know exactly how much was found.

The Court: All right. You and Mr. Simpson step into chambers, out of the hearing of the jury, and talk about it. Take any exhibits that you need along. And then return here. If you can agree, all right.

(Whereupon, Messrs. Gallagher and Simpson retired from the courtroom to confer.) [727]

The Court: Now, the court requires a yes or no answer to this question: Have you agreed upon a statement of an amount of money?

Mr. Simpson: No, we have not, your Honor.

The Court: All right. Then proceed with the argument.

All proceedings have been had in the presence of the jury, except the conference of the attorneys out in the hall.

The request was made as soon as the judge entered the room and before I had made the finding that the jury were present.

Mr. Simpson.

Mr. Simpson: Thank you, your Honor.

Mr. Gallagher, ladies and gentlemen of the jury, after yesterday's incident respecting my reading of the record, I did not believe there would be any further imputation of improper procedure on my part. I didn't believe that Mr. Gallagher, for example, was going to go so far as to suggest I was trying to hypnotize you, as he indicated, that I was trying to lead you by the hand or that I was

indulging in some kind of sophistry to get you to believe things that just, in fact, are not true.

But it seems to me that by going into such personal elements and trying to pursue those, we are losing sight of actually what is involved in the particular case.

Mr. Gallagher spoke to you at some length regarding a [728] number of issues, and in those he raised some which I don't believe at this time we need necessarily go into; items which are definitely extraneous and not relevant to the particular issues before you.

I think I would insult your intelligence if I tried to answer such question as, can you reasonably expect me to ask, does the City of Baltimore, one of the oldest cities in America, have adequate hospital facilities or are we accusing this corporation of killing this particular man.

Our position has been that the corporation, the Pacific-Atlantic, was responsible in that they violated their statutory duty of providing a reasonably safe place for this man to work. Let's go into the things that really count, the things Mr. Gallagher has brought up, and take them up one by one and see what conclusion we can draw. So we won't keep you too long, I will try to speak a little faster.

The Court: You take whatever time you need for your argument.

Mr. Simpson: Thank you, your Honor. The first thing Mr. Gallagher particularly endeavored to emphasize yesterday was that the plaintiff had raised a theory as to how this happened at 11:00 o'clock,

how the plaintiff is asking you to return and say, "We have found this is how the particular death occurred."

Now, I ask this question of you: What would you say if [729] I were, perhaps because of indignation over some of the things Mr. Gallagher has said about me, to go out and hire somebody to murder Mr. Gallagher?

Don't misunderstand me. What I am actually getting at is this: That if you had evidence, if you were a jury and had evidence before you, one, that Mr. Gallagher was found dead, and, two, evidence that I had actually hired somebody to murder him, it would be quite unimportant as to how he was murdered.

In other words, the responsibility, the liability that the law would impose upon me would be there because I was the cause.

Our position in this particular case has been, one, that Nathanael Patrick Hutchison was found dead.

Two, that the Pacific-Atlantic Steamship Co., his employer, did not provide adequate safety appliances in order to provide him with a reasonably safe place in which to work, and that for that reason their violation was the proximate cause of his death.

It doesn't make an awful lot of difference how this happened. We endeavored to give you the evidence yesterday as to precisely what the development was. It is immaterial how it happened, whether it happened at 11:00 o'clock, or whether or not it might have happened later on.

What we tried to suggest, frankly, was what we considered [730] to be, in our opinion, the most plausible way, but you, as a jury, are not obligated to find out exactly how it happened. In fact, the evidence, as we pointed out, is very silent on that, because nobody saw this happen. So you would have to actually infer from the evidence—it is the only way you can do it—there were no eyewitnesses to this.

Now, in this particular case Mr. Gallagher said, "Well, let's bear in mind the fact you brought in a witness by the name of Kalnin, the boatswain, and you tried to indicate he was confused, and then he proceeded to tell you, "Remember, Mr. Simpson vouches for the veracity of this man. Here he is coming in and attacking him."

Ladies and gentlemen of the jury, that is not true. What I suggested to you was not that Mr. Kalnin was lying in any way whatsoever. I don't believe he was lying. I believe, to the best of his memory, he was telling what he thought happened.

I suggested to you, in light of the evidence, there was possibility of confusion on the part of Mr. Kalnin. And that is the only thing we have brought out. In other words, I wish to make one thing very clear: That we are not taking the position that this did happen at 11:00 a.m. or 11:30 a.m. or 12:30 or 2:00 o'clock in the afternoon. We don't know, excepting that we do believe from the evidence you can make certain reasonable inferences. But to pursue that point is [731] to beg the question.

It is immaterial what hour it happened. The im-

portant thing in this particular case is the question, was this man provided with a reasonably safe place in which to work. If, because of a failure to provide that, this man experiences injuries and dies from those injuries, then the Pacific-Atlantic Steamship Co. is liable.

Now, Mr. Gallagher next went to the question of saying, "The plaintiff, remember, has the burden of proof and the court will tell you that." And that is true, and that is what we have endeavored to bring forth here.

In that regard, what did he point out to you? What was the particular thing that he emphasized? You remember he emphasized almost three years ago, he put me on the stand to bring this out, that almost three years ago he supplied my office with a complete list of all of the members of the crew and their addresses.

He said, "What has Mr. Simpson done? He has actually brought in the boatswain, who was in charge of the crew, and the testimony of Amundsen. He has brought in two of all these members of the crew. Why hasn't he brought in more? Is that carrying the burden of proof? Is that proving the case," Mr. Gallagher asks.

Ladies and gentlemen, let me take it a step further and point out why. We brought evidence from these two people who [732] were involved at the time. Now, bear in mind this is the important question: With all these other people who were employees of the defendant, if any one of them would have said one word which was contrary to the two

we have brought to you, can you help but believe they would have had that one person, if they could have found just one, who would have said something different? They would have had that one person on the witness stand here to tell you that this just wasn't true.

But, of course, there isn't even one witness from the defendant, from the captain of the ship right on down, that has come in here to tell you what these two witnesses, who were involved at the time, told you was false.

Consequently, we can only say in this connection, certainly, the plaintiff has carried her burden of proof, she has presented evidence. The evidence has not been rebutted in any way whatsoever, and there has been no attempt manifested here in this courtroom by the defendant to rebut that.

Then Mr. Gallagher moved to another type of argument. He said, "Let me point out to you this particular ship, the Linfield Victory, remember, was owned by us. You own part of it, Mrs. Hutchison owns part of it, all of us own it. Consequently, we should perhaps indict the United States of America if there is some type of liability here."

That type of argument is, I submit, absurd, because it is like reasoning that some one of you happened to be a friend [733] of President Eisenhower and you go to call on him because he is ill. You visit with him, and you are staying around there for a little while. He suggests maybe you want to use his car because you came in by plane. You get into the car and you drive, and you drive

negligently and you have an accident. So you say, "Well, after all, the person who was injured because of my negligence, I was negligent, that is true, but they can't sue me. They can't claim I did anything wrong, because I don't own this car." You say, "You see, this is the President's car. It is owned by all the people."

Who was actually operating this on April 24, 1951? It was not the United States Government that was operating this. The evidence shows that it was the Pacific-Atlantic Steamship Co. that was operating it. The United States Government had actually conducted the financing, built the ship, owned it during the war for the purpose of meeting the emergency we were confronted with at that time, but it was the Pacific-Atlantic Steamship Co. that was operating that ship.

What did Captain Dyer say with respect to the ship in August of last year? He said he was aboard and the agents at the present time are the Pacific-Atlantic Steamship Co. We can only conclude, to come up here and tell you you can't impose liability because this is owned by the United States Government is a specious argument that I am sure your common sense will reject. [734]

The next argument was made, in connection with the particular ship, that, "The Government hasn't seen fit to make any particular changes here and for that reason we concede it must be safe."

Again this argument must be rejected. I submit that the Congress has seen fit—and this is getting into what you call the people—our legislative repre-

sentatives in the Congress passed a law known as the Merchant Marine Act, commonly known as the Jones Act, the one we are in here under today, saying that all of these operators of ships must provide a reasonably safe place for their employees to work.

Our contention has been that they have not done this, so why do we have to pass additional legislation, why do they have to go out and go something when it is not a problem of new legislation needed here, but it is a problem of compliance with the law. Every time a murder is committed out here, you don't race out and pass a law against murder. You say, "Let's enforce the one we have."

We are here today. There has been a violation of the Jones Act, in that the employer hasn't provided a safe place for this man to work in.

Mr. Gallagher says, "Let's recognize the ship was inspected; in fact, paid experts, men who went on there. In fact, they were on there for a couple of hours."

Commander Sayer, the log will show that investigating [735] this in a couple of hours, "What kind of an investigation are you going to have more specifically?"

He said, "Remember, the important thing is that we have a certificate of inspection."

I would like to say a word or two about that. He showed that to you. He emphasized this was important because it showed how this ship was fit.

Ladies and gentlemen of the jury, I submit and ask you to examine carefully the certificate of in-

spection. That it in no way establishes that this was a safe place to work. And I want you to look at it quite carefully and you will see it is a general inspection. It does not have one word—and you look at it—it doesn't have one word on its face about this particular area at all.

Now, when you look you will see a list of the particular things that were inspected.

In fact, may I have that particular exhibit?

Thank you.

This certificate of inspection, which you remember Captain Crawford said is on all American ships, they can't even go to sea unless they have this certificate of inspection, and if this certificate of inspection meant that the ship was safe, there could be no violation, there would be no point in the Jones Act even, because that would mean you just couldn't have an unsafe place on any ship. You couldn't have an [736] insufficiency in appliances, because all the ships have to have this to even get out on the water; that is a general type.

Here it tells what they actually have. Mr. Gallagher read that. That is, it is constructed of steel and things of that nature. And then it goes on down and says: "The Following Particulars of Inspection Are Enumerated," and a general inspection followed by a particular inspection.

And I want to read to you this list, and if you can find any place on there where it mentions anything about a ventilator shaft or anything about illumination in that area, or anything about the

screens and safety, then you are reading something that I cannot find.

In other words, ladies and gentlemen, this reminds me very much of a particular instance I heard of once, where a doctor was called upon to examine an individual and he completed his examination, and the person who had sent the patient down there said, "Well, Doctor, how is he?"

And he said, "Fine. Fine. I couldn't find anything wrong with him."

He said, "What about the particular irritation on the skin there? Didn't he mention something to you about that?"

He said, "No, he didn't mention it to me particularly."

He said, "Well, that was the main thing I was concerned about. I should have mentioned that to you."

So another examination was conducted and they learned [737] this man had leprosy.

Now, the thing I am endeavoring to illustrate is when you have a general examination, which is designed for the particular purpose, you frequently get a result which is true in general, but when applied to the particular it is not. And that is the case with this particular certificate of inspection. There is not a thing, when you look at the particulars here, which are enumerated, that even mentions this particular area, and, therefore, I do not believe you should permit yourselves to be misled by such evidence, because if it were true you just couldn't

have a ship on the high seas that could have any unsafe place.

Well then, Mr. Gallagher went further and said, "I want to ask you this question: Would a reasonable person before this happened have anticipated that a person might fall into the ventilator shaft? Would a reasonable person might have anticipated this might have happened?"

The answer is an unequivocal yes, when you have an opening which goes down 20 feet 6 inches in depth, and it is on an area where people are walking—a small area, I might say—small in the sense that the total diameter is just a little more than six feet. You can take a step — Mr. Gallagher walked across this courtroom and measured off the courtroom. Every time he took a step he computed three feet. Two steps and you walk into the ventilator shaft. It is a small distance. [738] If a man makes a misstep, he is down in that ventilator shaft, unless he perchance is saved by the particular guard rails pointed to. They wouldn't have put the guard rails there if it hadn't been anticipated.

It is apparent to anybody looking in a place going down that deep if you anticipated it it does constitute a danger. The question here is if enough, if reasonable steps were taken, if you will, to render this place safe so that people like Nathanael Patrick Hutchison, working aboard this ship, would not be exposed to unnecessary risks and hazards.

The next question Mr. Gallagher put to us in argument was this: Was the Pacific-Atlantic Steam-

ship Co.—this was on the question of conducting a search — he said, "Were they expected, when Hutchison didn't get back until 4:00 a.m., because he was late, to start commencing the search?"

The answer to that question is very simple. If 4:00 a.m. had been a time designated that he was to meet there, to be aboard the ship, which there is no evidence in the record to show it was, then definitely if he did not appear they should have endeavored to ascertain where he was. He was supposed to report at 1:00 o'clock for work. He didn't report, and Amundsen said, "I wonder where Scotty is."

And the boatswain said, remember, "I will go up and take a look at the forecastle," which he did, because that is where his living quarters were.

The man had been tired. He wanted to see if possibly he had gone up there to go to sleep, or something.

The answer is yes, economics would tell you to look, because you don't want to be paying a man you actually haven't got working for you.

And, secondly, human concern for the safety and welfare of these people would make it mandatory that a search be conducted, plus the fact that Captain Crawford testified it is customary, when a seaman is missing, to commence a search for that particular seaman.

There are some other items Mr. Gallagher brought up that I think are rather significant, too. For example, he emphasized this point of sobriety. This distressed me considerably, because, as

he talked to you, he kept emphasizing this point, "Ladies and gentlemen of the jury, you are to decide this case upon the evidence." He kept insisting that is what you are to decide upon. That is correct.

And then he argued to you regarding a conclusion which is not founded upon the evidence. What evidence is there in this record to the effect this man was not sober? There is one word. It stands out. It has been repeated time and time again. The boatswain said, "When I woke him up that morning to get him to go to work, he was feeling rough and he appeared to have a hangover."

Now, the boatswain was asked, "Was he sober?"

And his answer was an unequivocal "Yes, he was sober."

Amundsen was asked — and Amundsen worked with him, that man was down there working for a few hours, remember,—"Was he sober?"

And Amundsen said, "Yes, he was sober."

Now, Mr. Gallagher in his argument, the course he has pursued here, would have you believe this man was not sober; there was something wrong here.

I submit if we for one second believed this man actually was not sober, the argument that we would have pressed with the greatest force in this case was the fact it was a type of criminal negligence to order a man who was drinking to go down into an unsafe area like this. If a man comes out and he is drunk or he is not sober and this boatswain wakes him up and finds he is not, and tells him to

go down into this dark area, climb into this shaft, that in itself would be the worst kind of negligence.

No, they considered him competent to go to work. They know he worked down there. The evidence is undisputed regarding the fact he did work down there, certainly, until coffee time, and then he went back down again and came up, and then we run into some conflict.

Let's go a step further, though. Mr. Gallagher emphasized, "You will hear about this presumption, but don't overlook these other things." The presumption that because this man [741] is dead, that he is presumed to have exercised due care for his own safety.

Now, that is a presumption, a legal presumption, just like you presume a man is innocent until proved guilty, and in the absence of evidence to the contrary showing he was not, you must go by that. There is no evidence in this record in support of that particular position. Now, really what is happening here, I submit, is something like the type of thing that might occur in any one of our homes. It might be that in my home, let's say, that the linoleum in the kitchen is torn up just a little bit, turns up at one side.

And my wife walks into the living room one night and sees me stretched out on the couch there watching television, reading a paper or something, and she says, "I wish you would fix that linoleum before somebody falls on it."

So I tell her that I will. And, well, typical of

my promises along that line, which are always beset with good intentions, a month later the linoleum is still torn up there. One night one of my little girls is returning from the dining room and she has a whole armload of dishes. As she walks into the kitchen we hear this awful crash.

What would you think of me if I raced out there and bawled her out and said, "Look, you knew that was there. You were clumsy. That is your fault."

And you would turn to me and say, "Mr. Simpson, that is [742] your fault. You should have made that safe. You should have repaired that. Don't blame her."

The defendant in this case is taking the position that, "After all, this man was aboard the ship and he certainly could have avoided falling into this. Don't blame us just because there was a hole there we didn't cover up, we didn't put a screen on, like we had the starboard side of this ship. Don't blame us because he fell in." That is not plausible.

The fault must be placed in this instance on the Linfield Victory. They should have anticipated—a reasonable person would have anticipated—on their own ship. I repeat in their ventilator shaft they had three screens, and Amundsen told us they had a screen on other Victory ships. He had been covering this particular area.

Mr. Gallagher objected when I started to read that. You recall that is what he said the important thing is, they did have screens on other ships covering that, so a man wouldn't get in there, and very little more has been said respecting that particular

argument, so I submit to you on this question of whether this man was exercising due care, we can only draw the conclusion, we have the legal presumption he was exercising due care and there is no evidence in this record to show anything to the contrary.

Another question brought up by Mr. Gallagher pertained to the question of employment. "Where is the evidence," Mr. [743] Gallagher says, "as to the exact time of this fall?"

Well, if he means the exact hour, the answer is simple; we don't know. There is nothing in the record and we are not contending it happened at 11:05, 11:10 or whatever it might be.

He is contending as to what day; we believe the evidence is sufficient. Since he was missed at 1:00 o'clock, the men did not know he was there on April 24th, that certainly this did occur on April 24th.

Well, does that prove he was in the employ of the particular steamship company? It seems to me that common sense again compels us to reach the conclusion he was employed by them. Is there any evidence in the record to show he ever left this particular ship? Are we to believe he went off and came back and jumped into the ventilator shaft, or what? Why would he get into there?

We know he used the particular shaft to go down into the hold. Mr. Gallagher says, "Now, just a minute. Just a minute, now. As far as the working area, the only evidence we have in this record respecting work is the fact that down below in the

hold these men were gathering things together, dirt and what not, to put in slings to be hauled out. But we have no evidence of the fact in the record that this man was in a work area, when we went through this particular masthouse."

Well, that is an absurd argument, I submit, for one [744] obvious reason, the boatswain told us that he told these men to go down there. That means men went down there. That they were aboard this ship. They were going down there for the performance of a duty ordered by this boatswain. And to try to say that they are not working until they get down there in the particular area and are picking up dirt is certainly an argument that Mr. Gallagher even knows isn't one that can be supported.

Actually, the point involved here is that a seaman has an unusual relationship. He is aboard this ship and he has his home as well as his factory there. It is something that doesn't happen in most cases.

But while he is aboard that ship he is subject to call for work there, while he is aboard that ship, whether he is eating lunch or whatever it might be. He is their employee. He is there for their benefit as well as his.

And, therefore, I do not believe that we need pursue that matter any further, because it is quite clear that we do have a situation where this man was employed, and there is not a scintilla of evidence in the record to show he did leave that ship. In fact, when he was found dead it was aboard the ship; not ashore.

Now, Mr. Gallagher, on the question of a safe

place, said, "Let's now be realistic about that. Let's recognize, with respect to the illumination aboard this ship, that we have [745] failed to have any presentation of evidence whatsoever that the lighting conditions aboard this ship were of such and such a quality on April 24th."

He said, "We haven't had one person take that witness stand——"

Mr. Gallagher: Just a minute, your Honor please. I assign that statement of counsel as incorrect. I assume it is an inadvertence. I didn't say "light". I said "visibility, condition of visibility, degree of visibility."

Mr. Simpson: I stand correct then. "Degree of visibility" on April 24th. I ask you, we have had testimony regarding the condition of visibility and I ask you what changes, if any, have been brought out by that testimony. Is there any reason to infer that changes have been made, that they had perhaps some type of permanent fixture in there on the 24th or something, and that it had been removed or something, by way of a special light that was in there that isn't there now or wasn't there when the others went aboard?

Fortunately, on this particular item, since we have witnesses telling you how it is dark and we have witnesses telling you how they can see so much, as I said yesterday, it is quite fortunate you have the pictures. You can look at them. Disregard what the witnesses have said, if you find you can't believe that, and look at the pictures and see, and the one thing that I feel you can't help but

admit is that [746] inside that masthouse it was not because of diffusion of light or what have you, as light as it would be outside, but somehow or another there was an adjustment so it becomes a question of degree. Look at the pictures and decide for yourself what that degree would be.

On this point Mr. Gallagher raised something quite interesting. He said, "Suppose that one of you get onto a bus and it is broad daylight and you have got a lot of light and you are walking down the aisle and you, of course, don't see the banana peel there. You step on it and there you go."

So you go to Mr. Simpson and he comes in here and says, "Let's sue the bus company because there was insufficient light."

Now, I think the interesting thing about his particular analogy, since in the case he gave there is no indication there was insufficient light, the interesting thing about his analogy is this: suppose there had been a hole in the bottom of that bus floor, and suppose that hole was the same size as the opening in that ventilator shaft and when you had gone down, remember the iron rails—make them the same distance as the iron rails here—and when you slipped on this banana peel or because of the jarring of the bus, or whatever it is, you went into that hole and you dropped on the cement below.

Then our position would be that this bus, if that hole had to be there, certainly, had not provided adequate safety [747] appliances for the protection of the passengers on that bus.

In this particular case, we don't know what hap-

pened. But we do know that he went down there. We do know he was found there. We do know that if they had done on this particular ship the same thing that had been done on other ships, and even the same thing, if they had done on this ship, fix the port side like the starboard side and actually have gone over and enclosed this, just like this one was enclosed (indicating), this wouldn't have happened. Or cover this with a screen as Amundsen told us.

That is the important thing about the particular illustration he has brought out. He went a step further. He said, "There is no evidence in this record to show the door was closed."

There is no argument about that. It is again something we have to infer. When you are concerned with the degree of visibility and the illumination, look at the pictures. Remember that John Hutchison said when you stepped in there, with the door open, even then, because it was like coming from a bright area into a darker one, you had to wait until your eyes became adjusted and then you can see around.

So this point of illumination, since it is the custom, as Captain Crawford said, to provide adequate illumination in the areas where the members of the crew are working, I might say to that point just parenthetically, here was a [748] man of experience who knew what we were concerned with here, and it never seemed to occur to him in his testimony, when he spoke of this custom and all that, this

necessarily was something that was not part of the employment of a man, or the area.

Well, the thing I am trying to bring out is that basically we are begging the question if we start going into whether it was real dark, real light or whatever it might be.

The primary question is this: Was this place a safe place to work? Did this employer do what was reasonably necessary to make it safe?

And our contention has been that with the custom to provide light, they should have provided adequate illumination. Even if you found they provided adequate illumination, we have to bear in mind the fact the screens were there.

Wasn't that a simple thing to do, a very simple thing, and not a new or novel device? Something they were familiar with. For that reason we submit that that particular attack or defense by Mr. Gallagher cannot stand.

The next thing he went to was this question of conscious pain and suffering. He said, "Now, after all, we have Dr. Glauser who performed the autopsy on this man. Wasn't he in the best position to determine whether or not this man could have experienced any conscious pain and suffering?"

Well, I submit this, ladies and gentlemen: I am not a [749] medical expert, as I am sure you know. We had three doctors on the stand here. We had Dr. Cefalu, who said, "In my opinion he experienced conscious pain and suffering, or he probably did."

Then we had Dr. Dickerson, who said he prob-

ably did, and then we had the defendant's doctor, Dr. Adelstein, who said in 40 per cent of the cases they do, in his opinion.

So I leave that to you. We are not going to press the matter. As I told you in opening argument, if you feel that he didn't experience any conscious pain and suffering, you can't give us anything and we don't ask you to. It is our conviction that the probability is that he did experience conscious pain and suffering.

Now, next Mr. Gallagher went to this point of acute dilatation of the heart. He didn't say a great deal respecting this, other than emphasize one particular principle, and that is these doctors all seem to agree on the idea that if you have acute dilatation of the heart you can black out.

Now, with that he somewhat passed on. But I think we must explore that just a little, because the important thing is not that they could black out—that is true—the important thing to be considered is that a man with acute dilatation of the heart occurring, if he were at the top of this particular shaft, would not have a subdural hemorrhage following it. [750]

I tried to explain that yesterday. You remember I read from the portion of the record that I had had the reporter type up. Dr. Dickerson was asked this question: "Can there be a subdural hemorrhage if the heart stops beating?"

His answer was:

"No. When the heart stops beating all circulation in the body ceases instantly. If there is an open or

torn vessel, the bleeding stops immediately. When the heart stops working, the circulation stops, because it is a pump forcing the blood around. When the pump stops, everything stops."

Now, remember I explained the significance, at least to me, of this. It is not a medical analysis at all, but that if you have got the pump and it is pumping this blood out in the normal course, how do you get a subdural hemorrhage? Well, something is broken. There is a leak over here, because you get a blow or something of that nature and you have torn or damaged veins or arteries.

When it springs a leak, how do you get the subdural hemorrhage? The blood that leaks out, remember, as all the doctors seem to be in accord, builds up into a clot and as that clot gets larger and larger it creates a pressure which causes death.

If you have acute dilatation and the heart stops, and then the man tumbles inside, there is no pump working and he [751] is at the bottom there. He would not have a subdural hemorrhage. That is the crux of the medical testimony. That is the key in this.

I don't know what the defense has attempted to do. They speak of how we are trying to lead you by the hand. Yet they would suggest fantasy, they suggest how it happened, they have given you a theory.

We have given you what we consider a more plausible one. I repeat it is immaterial whether it happened in the morning or in the afternoon. The important thing is that it happened and it happened

because of the failure by the Pacific-Atlantic Steamship Co.

Now, Mr. Gallagher said, "Well now, really, this will be resolved best if you just stop and think of the two doctors and you ask the question, of Dr. Adelstein or Dr. Dickerson, two neurosurgeons, which one, if you had a loved one," he said, "would you want to perform that operation, the man that is going to get in there in a half hour and perform or the man that is going to conduct thorough examination." That, I submit, is an attempt to mislead you.

I am sure you will recall from the examination Dr. Dickerson said, "Yes, these examinations should be conducted. I conduct as much as I can. If I am confronted with an emergency situation, the man may be dead in an hour, I am not going to sit around for three hours while examinations [752] are conducted and say we didn't have enough time to examine him."

He said, "I am going to be in there in a half hour. We can take the X-ray in the room. In other words, make an analysis. But the primary thing is to try to save the life."

I am sure that is what you would want with your loved ones. I certainly would, confronted with an emergency situation.

As a last item, one taken up first by Mr. Gallagher, he said he wasn't going to say anything about damages, and then he did say something about them. You remember the thing he said about damages was that if you look at the figure that the

plaintiff had put up here and see what she is asking, he said, "I ask you to ask yourself this question, when you consider that figure, if that sum of money, this particular amount, the $3,529.00 each year, if that were invested and it drew interest and it was a good investment, think of the 19 years of her life expectancy, what that would amount to and how much money you are giving her.

I ask you to think just a little further than that, because I am sure you would, anyway. I ask you to recognize that, first of all, that would assume that this money, her pecuniary, the money she has no longer for support and maintenance was not going to be used for support and maintenance, she has it free and clear to take down and put in an [753] investment, that just isn't true.

Secondly, it completely overlooks the fact of inflation. Now, we have a 19-year period here. Consider during the past 19 years what has happened to the dollar, and recognizing from that, that if you project it 19 years, is the sum greater or is it less? We might, of course, have a change in the economic cycle. I am not standing before you as a prophet on that at all. I am suggesting it would be unrealistic for you to say this sum must be reduced just because she could invest and making judicious investments come up with the amount of money that would be equivalent of that.

In other words, the thing we have tried to emphasize throughout this trial is that there was a legal duty and that it was not complied with by this defendant. That we were not asking them to do

anything that was unusual, that was extreme. We were asking them to do a very simple thing, to simply make this particular place *save* for the employees who would work in there.

Had they done the things we have suggested, had they put a screen in there, which they have been very silent on, this man could not have been down in the bottom of that shaft. Had they had it as they have it on the starboard side this could not have happened. Had they had illumination, adequate visibility it might not have happened.

When it happened, that is not your question. We will [754] concede maybe it happened in the afternoon; we don't know. You don't have to return with any feeling or verdict regarding that.

You do have to find, first, was a safe place, reasonably safe place provided for this man? Did this employer act as a reasonable person in providing sufficient safety appliances? Was his death, in other words, and were his injuries a result of the failure to do what a reasonable and prudent person would do? Then you must bring back, if you find that, a verdict for the plaintiff.

So far as the sum is concerned, we have suggested what we consider to be a fair and equitable sum. You must be the judges of that and determine to what she would be entitled in this particular case.

The important thing I wish to emphasize is that this is her only day in court. If you make a mistake she doesn't come back here and try to say, "Well, let's do it all over again." This is the time when you

judge, you be serious, you have taken your oath; I know you have meant it.

I only ask you to remember those words of the Persian poet, when you make up your verdict, when you reduce it to writing, that,

"The moving finger writes; and, having writ,
Moves on: nor all your piety nor wit
Shall lure it back to cancel half a line,
Nor all your tears wash out a word of it."

Friday, October 14, 1955

The Court: Let the record show the jury and alternate present and litigants represented.

Now, members of the jury, we come to the instruction part of this case. If I don't speak out with sufficient force that all of you hear me, just hold up your hand and I will try to put a little more voice into it.

You have heard arguments yesterday and today, but they were arguments which you are to consider, of course. Your judgment, that is, your verdict will be based upon the evidence. And what you are going to hear now is not argument, but it is instruction.

As each of the attorneys have told you, you are the exclusive judges of the fact. That means that so far as your decision upon the facts is concerned, which is all that is going to be submitted to you to decide, your judgment is final, and no one can inquire into it.

Oh, they might come around privately and ask you questions after it is all over, which you may an-

swer or you may just tell them to go away, as you desire. But no one officially has any power or ability to set aside your decision as to the facts in the case.

If, on the other hand, in what I tell you now I make [756] a mistake of substance the Court of Appeals, which has jurisdiction over this court, can set aside the whole proceedings and order us to start again, because of my error.

The reason for that being that I am a lawyer and what I tell you comes from the law books or from my reasonable application of the principles in the law books to the law of this case. And that is a legal matter and the Court of Appeals, in looking at what I say, has access to the same books to which I have access, and they can check up on me.

But you have heard the witnesses, and a Court of Appeals, on looking at a judgment in this case, doesn't have the witnesses before it. It has only the cold record. You are in a different position, having heard the presentation of the case here, than someone reading about it at a remote time in the future.

Hence, you must accept what I tell you by way of instruction. And the litigants and the judge must accept what you return here as the verdict as to the facts.

Now, counsel, in view of the fact that I have rejected so very many proposed instructions, and it was your duty to offer proposed instructions in order to tailor my thinking or direct it into the proper channels, but since I have rejected so many and have formulated my own charge, largely from

books, where it is being either directly or substantially quoted from a standard book, I will tell you what it is from [757] as I go along. I think it will be easier for you in stating your exceptions to the charge if I do that.

For instance, I am going to use California Jury Instructions Civil, which we commonly call B.A.J.I. I will simply say, "B.A.J.I. so and so" when I come to a number.

That, members of the jury, was for the attorneys. If I occasionally say, "B.A.J.I. number so and so" I am talking to them, because they have a privilege and, under some circumstances, a duty to take exception if they have any to whatever I say and to point out related things which I should also treat. So I am simply trying to indicate to them what my source material is, because they have it available to them, too, and it might suggest to them things which they should suggest to me.

Now, at the outset, the mere fact—and "mere" means only—the pure, simply fact that the man Hutchison died, in what has been termed here an accident, isn't enough for recovery, that is, recovery of damages here.

We have in some branches of industrial life what is known as workmen's compensation. That is a system by which persons who are injured or die in the course of their employment automatically set in force the return from the employer of certain benefits.

If they are dead their families get those benefits. [758] But that is something that just arises from

the relationship of employer and employee, and the fact of injury. This is not such a case.

That law does not apply to ships at sea, and if there is to be a recovery here it must be upon particular principles of law and because the defendant has breached some one or more of its duties, and that breach has been the proximate cause of the injury.

Now, these instructions necessarily take some time. I will undertake to go slowly. If, when you get into the jury room, you find that you are in disagreement as to what they are and it is a matter of importance to you to know again, you may come back and have an instruction repeated or enlarged upon. It is well for juries to try to rely upon their memory, but if you need further instruction the courtroom is open to you and the judge available to give it.

Likewise, if you find yourselves in dispute as to what certain evidence was, that is, what witnesses testified to, you may come back and have it read. But bear in mind that it takes about as long to have it read as it took to have it given in the first place, and it takes a little time for the reporter to look it up. Hence, you don't lightly come back here to have evidence read. But you come back if it is necessary for the proper pursuit of your consideration of the case. [759]

When you retire to the jury room you will elect one of your number as foreman, or forelady. The last jury I had it was a forelady. And that person presides over the deliberations. And it is a duty of

the foreman or forelady to see that every member of the jury has an opportunity to express what is in his or her mind and that each one gets to make their individual contribution to the discussion, and that the case is fully discussed and considered.

Then you come to the voting upon a verdict. And a verdict is the combined judgment of all twelve, becoming one judgment. It means that all twelve of you agree, all twelve of you are of one mind. Your verdict must be unanimous.

Now, it is the duty of the jurors to consult with one another, and each of you should bear in mind that every other one of you has been accepted here on the theory that you were as bright or practically so as every other one. At least, that you have comparable and approximately equal abilities here as persons of impartiality and persons who are going to give the case full and fair consideration.

Hence, you should listen to each other and no one should surrender an honest conviction, which you have and from which you cannot depart without violence to your own honest conscience. But if you can come into agreement, you certainly should do so because these cases should be brought to an end and not be tried over, and we should, if possible, [760] without any juror surrendering an honest conviction, have a verdict. And bear in mind again that any such verdict which you return must be unanimous.

There has been some talk here about speculation. Speculation simply means intuition or guessing.

There has been a lot of talk about an inference,

and a dictionary definition of inference, which I looked up,—Webster's Third International—is "The acceptance of a proposition as true from another which has been proved to be true."

Now, instructions of a judge to a jury are to be taken as a whole, that is, you don't go out and just single out one particular instruction and hang your case, or your decision upon that single instruction. You go to the jury room and you consider the instructions as a whole and view the evidence, which has been presented here, in the light of that total instruction.

If there is legal liability here, that is, if Mrs. Hutchison should recover, the fact that the United States has or had an interest in the vessel, the Linfield Victory, does not affect the responsibility.

This suit is not against the United States. This suit is against the operators of the Linfield Victory, who have leased the boat from the United States, and if there is liability they are liable. [761]

However, although it used to be that you couldn't sue the United States, for some time now it has been the law that the United States has just the same liability in cases where it does wrong as any other operator of an enterprise or property. But the fact that the boat was United States property does not detract from liability, if you find liability to exist.

Now, throughout the instructions I will have to give you rules of law which, to some persons, might seem to indicate that the judge feels one way or another about the case. You should bear in mind you

are the sole judges of the facts, and that it is the duty of the judge to fully instruct upon all legal issues, which might be considered by you, which might properly bear upon the decision.

Hence, in the course of the instructions I will talk about damages, but that doesn't mean that I am instructing you to give any, nor does this comment that I say it doesn't, mean I am instructing you to give any an indication that I think you shouldn't. I am just undertaking to give you the rules, and you apply them, without taking any cue from me as to whether or not the plaintiff should recover.

Because many of these instructions, having been given over and over in many cases, have been edited and compiled in books and the language smoothed out by scholars and editors, I am going to read many of them, but I have given some just out of my head so far and I will give others [762] extemporaneously, and I might read some from papers. It doesn't make any difference, they are all instructions and each are to be treated equally.

I am now reading B.A.J.I. 21:

"In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the 'burden of proof' as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more con-

vincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue."

21-B B.A.J.I.:

"While it is incumbent upon one who asserts [763] the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demonstration, that is, such degree of proof as, excluding possibility of error, produces absolute certainties; because such proof is rarely possible.

"In a civil action such as the one we now are trying, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring that party's side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue, the probability of truth favors that party."

B.A.J.I. 22:

"Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact, which, though true, does not of itself conclusively

establish the fact in [764] issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

"A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive,——" and we don't have any in this case of that kind "——it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

"An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts 'as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.'"

22-B:

"Whenever in these instructions I refer to a presumption, I mean one that may be rebutted. The fact that such a presumption arises must never be taken to mean any change in the rule of burden of proof. To explain this point more fully: A [765] party against whom such a presumption is directed, if he intends to deny it, must, of course, present evidence to the contrary, but if the burden of proof on the issue to which the presumption relates does not rest on him, it is not necessary for him to overcome the presumption by a preponderance of the evidence. In that case, with the burden of proof

resting on the party in whose favor the presumption is invoked, the presumption, together with any other evidence supporting it, to justify a finding in accordance therewith, must have more convincing force than the contrary evidence."

An edited excerpt from Lavender v. Kurn. Whenever facts are in dispute or the evidence is such that fairminded men and women may draw different inferences, the jury is to settle the dispute by choosing what seems to them to be the most reasonable inference in the light of the evidence which has been presented to that jury.

Sometimes a jury hearing evidence over a period of several days, as you have done in this case, will find that there are discrepancies between the testimony of one person and that of another. I will give you the rules which apply to that. B.A.J.I. 26:

"In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed [766] to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of the witness' testimony, or by evidence that pertains to the witness' motives."

B.A.J.I. 27-A:

"Discrepancies in the witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons

witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and it should be seriously considered."

B.A.J.I. 28:

"In weighing the testimony of witnesses, it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by [767] these questions: Did the witness have full opportunity to learn the truth? If so, did he have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage of his point of observation? Does the evidence show that the witness had a motive for favoring, or an inclination to favor any party? Was he, in other words, a biased or an impartial witness? What degree of intelligence, what quality of memory, and what grade of moral purpose, so far as concerns this case, were revealed by his appearance, manner of testifying, and all other evidence in the case? Was the testimony reasonable and consistent within itself and with uncontradicted facts? Was there any timidity, physical handicap, lack of ability in self-expression or other condition that placed the witness at a disadvantage or caused his testimony to appear on the surface as being less trustworthy than it really was? Was the witness dealt with fairly by counsel, or was he, without fault of his

own, confused or embarrassed and thus placed in a light not truly representative?

"Should you consider any of these questions, either in your own private reasoning, or in open [768] discussion, you must look for an answer only to the evidence admitted in the trial of the action."

B.A.J.I. 31:

"In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of the witnesses who have confronted you on the witness stand."

B.A.J.I. 33:——

Mr. Gallagher: 32, your Honor?

The Court: 33.

Mr. Gallagher: Thank you.

The Court: "The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the [769] case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opin-

ion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound."

B.A.J.I. 33-A:

"If you find there has been a conflict in the testimony of expert witnesses you must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified."

Now, no expert and no certificate of inspection may suffice for your duty. To the extent that those things are in evidence, consider them as evidence, to be weighed with all the other evidence.

But the sole duty, so far as the problem in this court is concerned, and so far as that problem exists between these litigants is for you. It is your judgment, and you must approach it independently of what any witness for either the plaintiff or the defendant, or any other body or inquirer has had in their experience, insofar as that has been related to you. [770]

All former inquiries have had a somewhat different purpose than the inquiry which is here today. This one is individual, that is, the inquiry which has been made in this case is individual to the purposes and requirements of this case, and to the extent that other matters, such as the inspection and the observations of witnesses who have come here and told you what they have observed, are con-

cerned, you should bear in mind that it is up to you and you have the responsibility of deciding this case, and you do not simply rubber-stamp any opinion which has been presented here, regardless of the form of evidence by which it has been presented.

I see in my notes I have put down "opinions of witnesses not a substitute for the jury," and that summarizes what I have taken more words to say.

The plaintiff in a lawsuit starts that case by filing a complaint, and that complaint places the defendant upon notice of what the defendant is accused of.

Now, I am not going to read the entire Complaint to you. But I will read an excerpt from it which states what Mrs. Hutchison contends, insofar as the heart of her cause of action, the disputed portions of it, are concerned here.

Now, it has not been disputed, for instance, that she is the executrix or administratrix—I forget which—in [771] any event, the person handling the affairs of the deceased or that she is the widow of the deceased, and so on. All those things she had to set forth in her complaint.

But I will read what the lawyers call the charging language of her complaint now at this time, insofar it concerns the first cause of action.

Paragraph VIII: "That on or about said 24th day of April, 1951, the said steamship 'Linfield Victory' was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and

performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween decks; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main [772] deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering; that said injuries were directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work."

A continuous duty exists on the part of a carrier, such as the defendant in this case, to use ordinary care in furnishing its employees with a reasonably safe place within which to work. The amount of caution required by that duty varies

in direct proportion to the dangers known to be involved in the work.

To put the matter another way, the amount of prudence required of an operator of a merchant vessel, in the exercise of ordinary care to furnish its employees a reasonably safe place within which to work, increases or decreases as do the dangers that reasonably should be apprehended.

In the absence of knowledge or notice to the contrary, [773] and in the absence of circumstances that caution him, or would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and he may rely and act on that assumption.

You will note throughout these instructions the frequent use of the word "reasonably". Reasonably is one of the key words in the instructions, but always consider it in relation to all the instructions.

The fact that Nathanael Patrick Hutchison had not yet signed Articles at the time of receiving his personal injuries in no way deprives him of his rights under the law upon which this action against the Pacific-Atlantic Steamship Co. has been predicated.

The Linfield Victory was in commission and Hutchison was an able bodied seaman performing deck maintenance duties aboard her. The fact that he had not yet signed the Articles might affect the duration of his service and his right to abandon his job, but did not qualify its incidence or define

its characters provided he was actually an employee. Whether or not he was actually an employee is, of course, a question of fact and for you to determine in the light of all the evidence.

In the event of injury Nathanael Patrick Hutchison was [774] entitled to the rights which the court has referred to and will refer to in these instructions, unless he had actually left such employment and whether or not he had commenced employment or whether or not he had left the employment are questions that are exclusively for the jury.

Portions of the title of the Commentary on the Jones Act in Title 46:

"The gist of an action under the Jones Act is negligence. In order to maintain an action under the Act, the seaman must prove negligence, for unless the seaman can establish negligence of the owners of the vessel, or her officers, agents, or employees, no liability exists."

The negligence of the owners of the vessel may consist in the failure to supply and maintain a vessel properly equipped and manned or the negligence of the master or members of the crew.

Now, the exact day, the exact hour of the incident, which has been alleged to have been an accident and which has been alleged to have been due to the failure of the defendant to use reasonable care in providing a reasonably safe place in which to work, the exact time is not material.

The exact time of the events, if they flowed from defendant's negligence, need not be spelled out in

detail by the evidence. But if plaintiff is to recover, the fact [775] of negligence must be proved.

Mr. Hutchison must have been injured while in the course of employment, in order for Mrs. Hutchison to recover damages here. And, of course, all the other things which I tell you must be established, you must find from the *evidence have* been established, or if you find to the contrary, you will not return a verdict in her favor.

Now, negligence has been defined in the law for a long, long time, and I am going to read you the classic definition which we learned in about the first week of the first year of law school. And although I think I know it, all of us know it pretty well by heart now, because it deals with many of the frequent problems which arise in the law, I am going to read it to you. B.A.J.I. 101:

"Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do some act which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs."

101-A: "Negligence is not an absolute term, but a relative one. By this is meant that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light [776] of all the surrounding circumstances, as shown by the evidence."

101-B: "You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally

skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct."

102-A: "Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required increases, as does the danger that reasonably should be apprehended."

Now, negligence in itself is not enough, any more than the mere fact of death is enough. There must be what we call in law proximate cause. 104:

"The proximate cause of an injury is that cause [777] which, in natural and continuous sequence, unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred. It is the efficient cause —the one that necessarily sets in operation the factors that accomplish the injury."

104-A: "This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and the omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a

case, each of the participating acts or omissions is regarded in law as a proximate cause."

Now, we have in law another phase of negligence which it is your duty to consider here, and that is contributory negligence. 103:

"Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains."

The fact I have defined negligence and contributory [778] negligence is not to be taken by you as an indication that either exist. Those are questions of fact which will be resolved by you.

Now, contributory negligence, however, has been mentioned in the instructions for a very important reason. In the law which applies to this case—although probably some of you know it doesn't apply to your ordinary activities in driving an automobile in California, or other matters, but it does apply to circumstances such as we have here—is that if a person injured is guilty of contributory negligence, then we get into what is called comparative negligence. That means simply that the jury, if they believe that there was negligence on the part of the defendant and they believe that the plaintiff was guilty of some contributory negligence, that the jury shall then assign percentages of negligence to both sides, and shall determine what the total damage was which was suffered and then diminish the amount of that damage by the percentage that

the contributory negligence entered in to producing the result.

If, for instance, and this is just an illustration—I don't suggest to you it is true, but you should consider whether it is, and it is an illustration of that instruction—you believe from all the evidence that Mr. Hutchison was feeling rugged—whatever that means, but you have heard the testimony—and that he had a hangover, then you would [779] consider whether or not a man, knowing that he felt rugged and having a hangover would go into the type of act or acts in which he was engaged at the time of the injury.

That is, would he go about masthouses and climb up and down ladders or would he take a sick-leave? Was it ordinary prudence, was it reasonable care for him to do that?

If you find that it was not or if you find there was some other contributory negligence — at the moment as I sit here that is the only thing in the evidence which occurs to me, but you will be guided by what occurs to you—that might be felt, upon a full analysis by a jury, to be contributory negligence, if you find there was, then if you have found primary negligence, that is, negligence on the part of the defendant, you will then assign to the contributory negligence some percentage and diminish the recovery, which is allowed because of the extent to which the contributory negligence exists, if it did exist, and if primary negligence existed.

B.A.J.I. 134: "In law we recognize what is termed an unavoidable or inevitable accident. These

terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an [780] accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

There are two causes of action. Lawyers speak of the basis of a lawsuit or the claimed basis of a lawsuit as a cause of action and each particular basis is a cause of action in itself. Mrs. Hutchison in her Complaint has set forth two causes of action. We have been discussing the first cause of action.

Now, in the first cause of action, if it existed, it existed fully at the last minute of life of Mr. Hutchison, because it is Mr. Hutchison's right to collect for conscious pain and suffering which he sustained as a result of the occurrence, provided, of course, you find all other things to be in his favor. And under the law as it exists today the right which a person has to collect for those things is inherited by their heirs.

Now, the matter of placing a money value on conscious pain and suffering is something which is very difficult to do. It has been suggested by Mr. Simpson, because the law requires him to suggest something, so he has selected a figure. But you are to determine, if you find in favor of the plaintiff, what the conscious pain and suffering, if it did exist on the part of Mr. Hutchison, should be compensated, [781] how it should be compensated in

terms of money. Not because that is an ideal way perhaps to compensate for pain and suffering—pain and suffering being one of those intangible things we have in life—but there just is no other way in which the law can compensate for it.

Now, in the old days of England, when these laws were being formed—and I don't mean by this instruction to suggest any sum or to suggest any particular circumstance, because you have heard the evidence and it is for you to decide. But just to give you a range here or a little of what the experience of the law has been, in the old days when this law was being formed, if there were a circumstance that a jury or a judge found that there had been a legal breach, but that it was very trivial and still they wanted to recognize it and give something as a token, but no more than a token, they would assess six cents. Six cents at that time must have had some particular monetary value, it was some monetary unit in England.

Now, I am not suggesting that that be your verdict or that it not be. I am just telling you the low limit to which the law has gone, where they have felt it was the proper thing to give some recognition to a cause of action, but not to give it any money recognition.

And if you follow law cases in the papers you might have noted here and there that there was a six-cent verdict [782] in this country. I think one of our national radio commentators got sued for libel and a jury somewhere awarded six cents damages, meaning he was hurt but not much.

Now, this is entirely a problem for you. I am not suggesting to you that your verdict should be six cents or $25,000.00 upon the first cause of action, if you find there was such a cause of action, but I am telling you these things for your use in discussing these matters.

B.A.J.I. 172: "You may not include in any award to plaintiff any sum that you might add for the purpose of punishing the defendant, or to make an example of it for the public good or to prevent other accidents."

Such damages would be in the nature of punishment. They are what the law calls punitive or exemplary rather than compensatory, and the law does not authorize that type of damage in this action.

175-E: "While the amount of the verdict is left to your sound discretion,—" if you find there should be a verdict "—your award must be just and reasonable, and must be based upon the evidence introduced. This does not mean that any witness should have expressed an opinion as to the amount of pecuniary loss suffered by the plaintiff. It means that your [783] judgment may not be arbitrary or fanciful, but must have evidence behind it."

We have talked a lot about evidence. It might just be of use to you—I think it should be included in a charge—to read you a law dictionary definition of evidence. I have selected the one which appears in Black's Third Edition at Page 696:

"That which furnishes or tends to furnish proof.

It is that which brings to the mind a just conviction of the truth or the falsehood of any substantive proposition which is asserted or denied.

"That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. The word 'evidence' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation * * *"

Now, the evidence here with respect to what the plaintiff claims was failure to search for Mr. Hutchison, under what she claims were circumstances that were such as to require a search, relates only to that first cause of action.

You will recall that there has been an issue tendered here as to how long, if at all, Mr. Hutchison was conscious [784] after he fell into the shaft, and the only item of damage which is claimed on that first cause of action is damage for conscious pain and suffering.

Now, as has been argued here, there might have been some palliative or comforting treatment, so that evidence was admitted upon that first cause of action. It is not to be deemed to apply to the second cause of action. As I told you, there are two causes of action, each of which should be borne in mind separately.

However, the law respecting negligence, the law respecting contributory negligence, the law respecting damages, which I have given you, all applies to the second cause of action, except that with

respect to damages there are additional matters which I should call to your attention.

Liability, if it exists, depends on the same facts respecting negligence, if it existed, contributory negligence, if it existed, and the need for proximate cause, and so forth, as the first cause of action.

Now, I will read you just the charging part of the Complaint which Mrs. Hutchison has filed on that second cause:

"That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, [785]to-wit, the 30th day of April, 1951, the exact date and the time of the death being to the plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent *of* the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages".

You must bear in mind that the first cause of action is just the cause of action that Mr. Hutchison had during his lifetime, if there is a cause of action there. And that if Mrs. Hutchison recovers she recovers as the representative of his estate, and any damages on the first cause of action then go by inheritance to those who are designated by law as succeeding to his cause of action.

That second cause of action is different in this respect:—in all other ways it is the same as the first—in this respect it is different from the first, it is Mrs. Hutchison's claim, not his. It is her claim

for damages because she has lost her husband, who she says was a substantial contributor to her support, and she says, "I have been damaged in that regard by reason of the same facts." Minus the pain and suffering, of course, but by the same facts which produced death in the partial bread-winner of her family.

So you see this is her cause of action and not his, [786] and if you decide this one, you decide it in her favor for the damage which she has suffered.

In determining the pecuniary loss to which I have referred, you may consider the age of the deceased and of Emma Hutchison, beneficiary of this action; the state of health of the deceased and of Mrs. Hutchison, as it existed at the time of the death and immediately prior thereto; their station in life; their respective expectancies in life, as shown by the evidence;

The disposition of the deceased to contribute financially to the support and other advantages of the beneficiary and his actual habits and practice in respect to the making or not making such contributions;

The ability of the deceased and his inclination to and habit of performing or not performing services having a monetary gain for the beneficiary. By "beneficiary" I mean Mrs. Hutchison;

What the deceased was earning at the time of his death, what he customarily earned prior thereto and within a time reasonably to be considered, and what his earning capacity was; what his personal

expenses and other charges and deductions against his earnings were, and such other facts shown by the evidence as throw light upon the question of what pecuniary benefits the beneficiary might reasonably have been expected to receive from the deceased had he [787] lived beyond the untimely death in question.

With respect to the matter of life expectancy, you will keep this point in mind, if you should decide for the plaintiff: The prospective period of time that will be of concern to you, in your effort to find the pecuniary loss of the beneficiary, is only the shorter of the two life expectancies, that of the beneficiary or that of the deceased, because manifestly one could not derive financial benefit from the life of another for longer than while both are living.

According to the Commissioner's 1941 Standard Ordinary Table of Mortality, which is a book of reference to which the courts look, the expectancy of life of Nathanael Patrick Hutchison at age 44 was 26 years. And the expectancy of life of Emma Hutchison at age 53 was 19 years.

Now, there are small fractions there which are not of sufficient consequence to read to you. This fact, of which the court takes judicial notice, that is, what the mortality tables show concerning prospective life, is now in evidence to be considered by you in arriving at the amount of damages, if you find that plaintiff is entitled to a verdict upon her cause of action.

However, the restricted significance of this evi-

dence should be noted. The life expectancy as shown by the mortality tables is merely an estimate of the probable [788] average remaining length of life of all persons in our country of a given age, and that estimate is based on, not a complete but only a limited record of experience.

Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger and disease of people of that age.

Thus, in connection with this evidence you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits, risks, securities and activities of the person whose life expectancy is in question. And as Mrs. Hutchison had the shorter of the periods of life expectancy, you may consider his with respect, of course, to the probabilities of extended life, but if you use these in any way in measuring the period of time that Mrs. Hutchison could reasonably expect the contribution, you must accept the shorter, that is, the 19 years, because that was her life expectancy under the mortality tables.

Those were 301-P and 177 as a basis with interpolations.

Now, all persons are presumed to use reasonable care. That is a presumption. It applies in this case to Mr. Hutchison in his activities at and about the time this incident occurred. It applies to the defendant corporation at and about the time this occurred. It is a presumption.

You are to look only to the evidence in the case.

Attorneys have, from time to time, made objections but those were addressed to the court as a matter of law, and that is one of the things their clients pay them to do.

You are not to be guided by the reasons for rulings on objections, but to consider the evidence, such evidence as did get in, and not speculate upon what evidence might have gotten in had there not been objections or other rulings of the court.

Of course, you being the quality of people you are, I am only mentioning this because it is a standard part of jury instructions. I know you will follow it. You are not to be guided by any feeling of passion, prejudice, pity or sympathy. Decide the case upon an intellectual basis, that is, an analysis of the evidence and the measuring of that evidence by the law which the court has given you.

Mr. Bailiff, I asked the secretary to do some typing for me. Did she send it in?

The Clerk: Yes, sir.

The Court: You will be given general verdicts. By general verdicts, I mean there are forms of verdicts, four in number, which you can fill in, finding either for the plaintiff in a certain amount, one verdict for each cause of action, or finding for the defendant.

Now, if you find for the plaintiff the court submits to you certain interrogatories, which are to be answered. [790] In each instance the verdict and the interrogatories shall be answered by the foreman or the forelady, signing and filling in the appropriate blanks. That should be done in ink.

That should be done by a person who can stand up in court and read them. Some people are timid, and I wouldn't assign the duty to such a person. Each interrogatory must be answered with the same unanimity as the general verdicts are reached.

I will read them to you. "If the verdict is in favor of plaintiff,—" Counsel, these are exactly the ones which were in the file, which have been referred to as the court's.

"What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?"

By that we mean what was her pecuniary loss at the moment of his death, because she had been precipitated into the state of widowhood by that death. It doesn't have any reference to what it was by reason of a fact that he was killed in an accident. If he had died of pneumonia or dropped dead of heart failure she, as the widow, would have suffered a pecuniary loss, and that is what we mean by Interrogatory No. 1.

"What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?"

A Juror: That has to do with cause of action No. 2, does it not? [791]

The Court: No. 2. Actually, it is a question which might have applied to her or to her family advisers, independently of the lawsuit. But, of course, it will only have pertinence here if you find a verdict for her upon cause of action No. 2.

The Juror: I just want to be sure you were taking No. 2 first, before No. 1.

The Court: "Interrogatory No. 2: Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?

"Answer 'Yes' or 'No.'"

Now, of course, before you would find a verdict in favor of Mrs. Hutchison upon cause of action No. 2, you would have found that the defendant was guilty of negligence and that such negligence was a proximate cause of an injury from which Mr. Hutchison died, and that answer is included in a verdict in favor of the plaintiff.

But you would also then answer this interrogatory, "Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?"

We mean by that the contributory negligence that I have dealt with in these instructions.

"Interrogatory No. 3: A. If your answer to Interrogatory No. 2 is 'yes', state the extent in percentage that the negligence of Nathanael Patrick [792] Hutchison proximately contributed to his death."

That is, if you think he was contributorily negligent, was that contributory negligence one per cent or was it one hundred—well, if it was 100 per cent it would mean that it was solely his negligence—or was it 99 per cent, or was it some percentage in between.

If you find in favor of Mrs. Hutchison and you find that Mr. Hutchison was guilty of contributory negligence, you put the percentage in here.

"B. Translate the percentage into dollars as a

percentage of the amount given by you in answer to Interrogatory No. 1. What is the amount thus computed?"

That would be a sum of money, and to just stay out of sums of money that would apply to this second cause of action, it would be one cent, two cents, ten cents, or whatever it happened to be.

I use those pennies to just not suggest any sum within sums which would be considered by you in respect to the second cause of action.

"Interrogatory No. 4: Subtract the amount of money stated by you in answer to Interrogatory No. 3 B from the amount of money stated by you in your answer to Interrogatory No. 1. What is the result of this computation?" [793]

That is, you would have in Interrogatory No. 1 found how much she lost by reason of losing her husband, how much in terms of damages from that fact, and measured by all the rules I have given you. Then you would have, in answer to another interrogatory, found the percentage that he was contributorily negligent, if you have found there was contributory negligence.

Now, in answer to No. 4 you give the amount that is left of the damages which she has sustained after making the diminishment required by reason of his contributory negligence, if you find that there was such negligence.

I keep saying "if you find" in these things because I want to obey one of the cardinal rules of judging, which is that the judge must never suggest to the jury what the verdict should be, unless

in certain rare cases, and this is not one; an entirely different type case than this. A judge must leave it to the jury. So a judge must habitually say, "If you find" so that you are continually alerted to the proposition I am not suggesting any particular verdict by these instructions.

Those are all the interrogatories.

The foreman will fill in the answers. The foreman will fill in the general verdicts, and they will be returned with you.

We have the aids in your deliberations of the exhibits, [794] which will be sent to you in the jury room. If you need to have any evidence read, if you really need it—bear in mind that it takes a little time, so don't ask for it lightly—but if you really need it, come down and ask for it. Just let the bailiff know.

If you need further instruction, come down and ask for it. The customary way of letting the judge know that you need these things is for the foreman to send the judge a note through the bailiff. Even at that, you don't talk to the bailiff about the case. You tell him to please take the note to the judge. You just don't talk to anyone about the case, except among yourselves. But among yourselves you discuss it freely.

It being noon, as soon as we have heard the exceptions, if any, or the suggestions or amendments to the charge, if any, we will send you to lunch and then you take whatever time is reasonably necessary to work out proper verdicts in the case.

A Juror: May I be excused now, the alternate?

The Court: You are the alternate? We will find out in a minute. Perhaps not a minute, but we will find out shortly. I have it in mind.

The court will now hear exceptions, suggestions for amendments, deletions, or corrections of the charge. You will please approach over here at the side. [795]

Mr. Gallagher: May I suggest, your Honor, wouldn't it be proper to instruct the jury not to deliberate yet, but to send them to lunch——

The Court: No.

Mr. Gallagher: ——so they won't have to sit here?

The Court: They won't have to sit long. Except in a couple of extraordinary cases I have had, the statement of these matters has never taken more than five or ten minutes, and I am not going to let it take more here, and I don't think anyone would offer more here.

So I will just tell the jurors, remain in the box and don't talk about the case yet, because it isn't submitted to you until the instructions are completed, and I might have overlooked something which counsel will bring to my attention.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury.)

The Court: Before you begin, Mr. Gallagher, if you except to the refusal of the court to give any one of the charges you offered, refer to it by number and hand it up to the court. I will take a look

at it. No argument on it, please. State the exception. That will be enough.

Mr. Gallagher: Before I commence to do that, I respectfully take an exception to the remarks made by the court, in the presence of the jury, that, in effect, ordinarily competent lawyers would not make exceptions which [796] took more than five or ten minutes.

I will state to your Honor that it is impossible for me to state the exceptions that I have to the charge which you have given in any five or ten minutes. It is physically impossible.

The Court: How much time will it take?

Mr. Gallagher: It will take me one hour.

The Court: I will grant you one-half hour. I will send the jury out for a half an hour.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Members of the jury, circumstances have been directed to my attention, which I had overlooked, which indicate that we will be several minutes at this. I think you will probably be more comfortable in the jury room. So all of you go up there, but don't discuss the case. The bailiff will notify you when to return.

(Whereupon, the jury retired to the jury room.) [797]

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

The Court: The charge didn't take an hour, Mr.

Gallagher, while it took me more than an hour to read your proposed instructions.

You can refer to them by number in less, so I will expect you to conclude by 12:30. It is now four minutes after 12:00.

Mr. Gallagher: Is your Honor restricting me to one-half hour?

The Court: Yes. Knowing your abilities and also knowing your propensities, I restrict you to one-half hour.

Mr. Gallagher: I respectfully object to that restriction and contend that it is impossible.

The Court: I don't care about your contentions. State your exceptions, state your suggestions.

Mr. Gallagher: Now, the defendant excepts to the instructions given by the court as follows:

The court has incorrectly defined inference by reading to the jury the definition from the dictionary.

It is not a correct or legal definition of inference as ——

The Court: Are you satisfied with the one in B.A.J.I.? I read that one, too, but if you except to the one that I read, I will re-read the one in B.A.J.I. and tell them that they are [798] limited to that.

Mr. Gallagher: I do accept the definition, if it is in BAJI.

The Court.: All right. I will amend the charge in that respect. Next subject.

Mr. Gallagher: I except to the instruction wherein the court told the jury that the fact that

the United States has or had an interest in the vessel Linfield Victory does not affect the responsibility of the defendant upon the following grounds:

No. 1——

The Court: I don't care what grounds you state. I am going to let the charge in that respect stand, in view of my research on it and in view of the argument which we have heretofore had.

Your exception is sufficient for the purpose of this court.

Mr. Gallagher: I respectfully request permission to state it for the benefit of the United States Court of Appeals.

The Court: They will know what you are getting it.

Mr. Gallagher: I except to the instruction given by the court that the operators of the Linfield Victory are responsible for the physical structure of the ship and have placed upon them any burden to change the physical structure [799] of the ship upon the ground that the charter party prohibits it, without the consent and permission of the Government, the owner.

The Court: That is frivolous. You needn't go further on that one.

If you want an extended instruction, I will tell them exactly how I feel on that, which is very different and which I am sure the court would uphold.

No one can by contract take over a property in a method which gains immunity from acts of negligence to others.

Mr. Gallagher: I except to the giving of the in-

struction with reference to presumptions, because the court has not told the jury that they are not entitled to indulge in any presumptions excepting those specifically referred to by the court.

The Court: Refused, but noted.

Mr. Gallagher: I except to the instruction given by the court that any party who intends to deny the *affect* of a presumption must present evidence to the contrary.

The Court: I simply read B.A.J.I., didn't I? What number was that?

Mr. Gallagher: 22-B, but that doesn't make it good.

The Court: All right. Exception denied. Anything that appears in B.A.J.I., if it is applicable to a case, the court considers as good, considering the authority of that [800] work and the way in which it is universally or almost universally respected.

The question of presumption and burden of proof is applicable to every case, so the exception is merely noted. I will not amend it.

Mr. Gallagher: I except to the instruction that whenever facts are in dispute or the evidence is such that fair-minded men and women may draw different inferences, the jury is to settle the dispute, upon the ground that that is not a question of fact for the jury to determine, whether the evidence is in such state that fair-minded men and women may draw a different inference.

The Court: I had that case of Lavender v. Kurn sheppardized and I modified the language of Kurn

v. Lavender as I felt that the present complexion of the Supreme Court would have modified it if they were acting upon it as language of instruction.

Exception noted. No further argument on that one.

Mr. Gallagher: I except to the instruction that the court gave to the jury with reference to the Certificate of Inspection, which has been introduced in evidence, wherein the court instructed with reference to questions of fact and deprived the defendant of its right to a jury trial.

The Court: I told them to consider it as evidence. It is evidence, the same as all the other evidence. [801]

Exception noted, and I will not instruct further on that.

Mr. Gallagher: I except to the instruction with reference to your Honor's discourse on the Certificate of Inspection for another reason, that it ignores the testimony of the witness Dyer as to the extent of the inspection, and it ignores the presumption that official duty has been performed and that it is in itself evidence, because it is a disputable presumption, and the jury must find in accordance with it, in the absence of evidence direct or indirect, to the contrary.

The Court: Exception noted.

Mr. Gallagher: I except to the instructions given by the court for the reason that the court did not state to the jury the issues, the specific issues as raised by the pleadings and state to the jury that their consideration of the evidence is to be restricted to those specific averments of alleged negligence.

The Court: I will undertake to amend that.

Mr. Gallagher: I except to the——

The Court: Just a moment, until I make an adequate note, because I can't remember all you say.

All right. Proceed.

Mr. Gallagher: I except to the instruction, the part of the instruction as follows:

"In the absence of knowledge or notice to the contrary [802] and in the absence of circumstances that *caution or* would caution a reasonably prudent person in like position to the contrary, an employee may assume that the employer has exercised reasonable care in furnishing a reasonably safe place within which to work and may rely and act upon that assumption" upon the ground that everything connected with the masthouse and the shafts, and so forth, was plainly obvious and there is no basis in the evidence for that instruction.

The Court: That instruction was based upon BAJI. Exception noted.

It was BAJI. I think I read it verbatim.

Mr. Gallagher: I take exception to the instruction that the fact that Nathanael Patrick Hutchison had not signed Articles at the time of receiving the personal injuries in no way deprives him of his right under the law, upon the ground that that instruction assumes as a fact that he had some right under the law. In other words, to collect damages.

The Court: Exception noted.

Mr. Gallagher: And the same exception is taken to the instructions given by the court with reference to Mrs. Hutchison's rights under the law.

The Court: Noted.

Mr. Gallagher: I except to the instruction of the court, "That in the event of injury Nathanael Patrick Hutchison was entitled to the rights which the court has referred to and [803] will refer to in these instructions, unless he had actually left such employment, and whether or not he commenced employment or whether or not he left the employment are questions that are exclusively for the jury," upon the ground that that instruction calls the jury's attention to the assumption that Nathanael Patrick Hutchison had a legal right to recover.

The Court: I think he did, whether he was a member of the crew or not, if he were an invitee or even a licensee.

But I didn't want to go into those things, since there has been no contention here. I could have expanded for an hour upon the rights of persons, other than crew members.

I think, in order to keep the instructions to where they would be useful to the jury and still be the law, I had to condense that to the relevant portion of the law. The exception is noted.

Mr. Gallagher: I except to the instructions of the court wherein the court defines negligence generally, wherein the court refers to acts or omissions with reference to the defendant, upon the ground that the court has thereby expanded the issues and has not confined the jury to a consideration of specific alleged failures, which do not include any acts on the part of the defendant or its employees.

The Court: Amendment to the instructions denied [804] except insofar as it will be covered by my further instruction, that they are restricted to acts of negligence charged in the Complaint.

I thought I gave that, but I do not see it specifically in my notes, so I might have omitted it.

Mr. Gallagher: I except to the instruction given by the court that at the time Nathanael Patrick Hutchison suffered his injuries he was acting in the performance of duties as a deck maintenance man.

The Court: I don't think I told them that he was.

Mr. Gallagher: I think you did, your Honor.

The Court: All right. I will tell them it is a question of fact.

Mr. Gallagher: I except to the instruction that negligence is the doing of some act which a reasonably prudent person would not do or the failure to do some act which a reasonably prudent person would do,——

The Court: Oh, that is Blackstone, Chitty and all the other people——

Mr. Gallagher: May I finish my exception, your Honor?

The Court: I read it from BAJI.

Mr. Gallagher: ——upon the grounds that the allegation, so far as the defendant is concerned, relates solely to alleged omissions.

And unless the court says that that applies to Mr. [805] Hutchison, but that only evidence which

may show alleged omissions applies to the defendant, the instruction is prejudicial.

The Court: Exception noted.

Mr. Gallagher: I take exception to the remaining instructions which refer generally to negligence, without confining it to the particular and specific acts of alleged omissions set forth in the complaint, so far as the defendant is concerned.

I except to the instruction given by your Honor with reference to the increase or decrease in the amount of care which must be exercised, because the court pointed that at the defendant and did not say that Nathanael Patrick Hutchison was required to do the same thing.

The Court: If I instructed the way you want me to it would take me a whole week. Denied.

Mr. Gallagher: I take exception to the instruction given by the court with reference to contributory negligence, wherein the court told the jury that the only thing it could think of was the testimony with reference to the fact that he felt rugged and might have a slight hangover, upon the ground that that is an instruction with reference to fact which deprives the defendant of a right to a jury trial.

The Court: What other possible basis for contributory negligence is suggested by the evidence? Tell me and I will [806] amend my comment to the jury.

Mr. Gallagher: If the man climbed over the pipe railings, in the full possession of his faculties, at a time when he could see what he was doing,

that he was guilty of gross negligence, and such negligence would be the sole proximate cause of his injury and would, at least, be a proximate cause to a great extent.

He could have climbed up the escape shaft, as plaintiff claims, in utter darkness. If he did so he was guilty of gross negligence which would proximately contribute to his injuries, and so forth.

Those are not the only things he could have done or omitted. And I say that the court cannot tell the jury what is the extent of contributory negligence or what facts they can consider in determining that issue.

The Court: I can comment on the evidence.

Mr. Gallagher: I contend it is a violation of our constitutional right to a jury trial.

Now, I take exception to the instruction given by your Honor, where you told the jury that at the very time he suffered his personal injuries he was actively engaged in the course of his employment, or was in the course of his employment.

The Court: If I told them that, I didn't mean to and I will make a correction. [807]

Mr. Gallagher: I take exception to the instruction——

The Court: Just a moment, until I make a note. All right.

Mr. Gallagher: I take exception to the instruction given by your Honor to the jury, wherein you stated specifically that it didn't make a particle of difference what time this alleged accident occurred, for the reason that the course of the em-

ployment is a very essential issue here and the time is, therefore, of material importance and it is the burden of the plaintiff to prove that the injuries were suffered in the course of the employment and the time is a very material element in determining that factor.

The Court: Noted.

Mr. Gallagher: I except to the refusal of the court to submit to the jury an interrogatory requesting the jury to state on what date Nathanael Patrick Hutchison suffered his injuries and at what time on such date.

The Court: Let me remind you that you withdrew your proposed interrogatories, which were very specific on that, and asked me to give the ones I had at the last trial. I took the ones that I had at the last trial verbatim.

Mr. Gallagher: I would like to call your Honor's attention to something. I proposed a specific——

The Court: Didn't you yesterday withdraw all your proposed interrogatories? [808]

Mr. Gallagher: I withdrew the ones that I had requested before the end of the first trial. I have not withdrawn any requests for any special interrogatories lodged in this court after the commencement of this trial.

The Court: You can't play here as if you were playing with marked cards. I have submitted a sufficient group of instructions to the jury. I take notice of that fact that you came into this court with an announced intention to appeal if you lost, and to trick this court into error.

Mr. Gallagher: I have made no statement——

The Court: You didn't use the word "trick".

Mr. Gallagher: ——I was going to try to trick the court——

The Court: You didn't use the word "trick". But you told me that I couldn't try this case without error that you could get it reversed on.

Mr. Gallagher: I told you that?

The Court: Yes, you did. I think you don't know how strenuous your conduct has been. Your face has been twitching, you have been blinking like Susie on television. You have been an absolutely intemperate advocate here.

Mr. Gallagher: Your Honor, I lodged a written request for special interrogatories with the clerk yesterday morning at 8:57, or 8:53.

The Court: I read it. It is denied.

Mr. Gallagher: If your Honor please, the defendant takes exception to the refusal of the court to give its proposed Instruction No. 11 upon the ground that the matters [809] covered by that instruction have not been covered by the instructions given.

The Court: Will you pass it up, please?

These go from 8 to—that is a hiatus; from 8 to 23.

Read me enough of 11, Mr. Gallagher, that I will have it recalled to my mind.

Mr. Gallagher: Your Honor, the subject of 11 is to set forth the issues of fact which the court is submitting to the jury, with reference to the claim of actionable negligence, and also tells the jury that there is no burden on the defendant to

offer any evidence whatever for the purpose of disproving the averments set forth in Plaintiff's Complaint, and that the averments of Plaintiff's Complaint do not constitute the slightest evidence. Those have not been covered by the instructions given.

The Court: Exception noted.

Mr. Gallagher: I take exception to the refusal to give defendant's proposed Instruction No. 11-A for the same reasons which I have referred to with respect to defendant's proposed Instruction 11.

The Court: Noted.

Mr. Gallagher: I take exception to the refusal to give proposed Instruction No. 13, which would have told the jury that they are not permitted to determine what issues of fact are raised by the pleadings.

The Court: They haven't seen the pleadings in this case, nor will they. I read them the charging language.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction 14-A, which——

The Court: What are the first words of it?

Mr. Gallagher: "The court will call to your attention certain specific averments set forth by the plaintiff in her Complaint."

The Court: All right, that is enough. Denied; noted.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction No. 15, which would have told the jury that there is no claim of the plaintiff to the effect that any appliance in the masthouse was defective and points out the specific claim which she does make.

The Court: Noted and denied.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction No. 15-A for the same reasons stated with respect to the refusal to give No. 15.

The Court: Denied. It is noted, but I refuse to give it.

Mr. Gallagher: I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 16-A upon the ground that the principles of law set forth therein have not been covered by the instructions given by the [811] court.

The Court: Will you read me the first words of 16-A?

Mr. Gallagher: "There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2."

The Court: Noted and denied. When I said "noted" I mean it is noted for your purpose on appeal.

When I say "denied", I mean I refuse to read it to the jury now, for all reasons which are legally applicable to such refusal.

Mr. Gallagher: I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 17 upon the ground that it states principles of law, which have not been covered, and as to which the defendant is entitled to have the jury instructed.

The Court: The first words, please.

Mr. Gallagher: "Insofar as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides,——"

The Court: Denied. Noted and denied. It is covered by other instructions. [812]

Mr. Gallagher: I respectfully except to the court's refusal to give defendant's proposed Instruction No. 18 upon the same grounds and each of them heretofore stated.

The Court: Noted and denied.

Mr. Gallagher: I except to the refusal of the court to give defendant's proposed Instruction No. 66, which has to do with the——

The Court: All right. I think I have that one here. It was filed in sequence.

Mr. Gallagher: In the light of the argument made by Mr. Simpson to the jury, that it was our obligation to bring in some witnesses, the refusal to give that instruction is particularly prejudicial.

The Court: Noted and denied.

Mr. Gallagher: The defendant respectfully excepts to the refusal of the court to instruct the jury with reference to what would constitute negligence on the part of the deceased himself.

The Court: Noted and denied. I think I have covered it adequately.

Mr. Gallagher: The defendant respectfully excepts to the refusal of the court to instruct as requested in No. 28, that a seaman has a right, under

certain circumstances, to quit his job at any time he may see fit to do so.

The Court: Denied. That is exactly contrary to what [813] you have been arguing here.

Mr. Gallagher: I take exception to the refusal of the court to give proposed Instruction No. 30-A upon the ground that that would tell the jury what is actually within the—an act within the course of employment and would restrict the jury to the proposition that if the plaintiff doesn't prove that particular element by a preponderance of evidence that she could not claim that there was any failure to furnish a reasonably safe place to work, or that he was actually engaged in the course of his employment.

The Court: The instructions in the file go to 30, and then to 31. When did you file 30-A?

Mr. Gallagher: I gave that to—well, it was last week, your Honor.

The Court: Then the clerk probably has it among the unfiled ones.

Did you file it or did you just run in and hand it to my secretary? Lawyers have a way of doing that, and that is not filing things.

They hand them to my law clerk and he treats it as something they are asking for research upon.

Those things which are intended for the court's attention should be handed to the clerk.

Mr. Gallagher: Isn't it there?

The Court: Well, we are searching for it. [814]

You may read it. I hope it isn't one of your long ones.

Mr. Gallagher: Well,——

The Court: Read enough of it that I can see if it has legal vice in it.

Mr. Gallagher: "A seaman does not suffer a personal injury in the course of his employment, unless less at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer, or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment."

The Court: Covered by instructions given. Noted and denied.

Mr. Gallagher: I respectfully except to the refusal of the court to give defendant's proposed Instruction No. 31, or in lieu thereof 31-A, which has to do——

The Court: Just a moment, until I find it here.

Noted and denied.

Mr. Gallagher: I respectfully except to the refusal of the court to give the proposed defendant's instructions with reference to foreseeability as being one of the essential elements of actionable negligence. In other words, [815] Nos. 32, 32-A, 33, 34, 35, 35-A, 36, 36-A and—that is it. 36-A is the last one. Upon the ground that your Honor has not fully or correctly instructed the jury with reference to foreseeability.

The Court: Noted.

Mr. Gallagher: I respectfully except to the refusal of the court to instruct the jury, as requested by the defendant, that the pipe railings surrounding the ventilator shaft were, as a matter of law, a safety appliance.

The Court: Denied. Noted and denied.

Mr. Gallagher: I respectfully except to the refusal of the court to instruct the jury that there was no duty on the part of the defendant to furnish an appliance which would be reasonably safe for any seaman, unless such seaman was exercising ordinary care for his own safety and preservation, in the use thereof, or in the vicinity thereof.

The Court: All right. Next one.

Mr. Gallagher: I respectfully take an exception to the refusal of the court to instruct the jury in accordance with defendant's proposed Instruction No. 52, to the effect that from the disputable presumption favoring Mr. Hutchison the jury could not infer or presume any negligence on the part of the defendant.

The Court: Noted and denied.

Mr. Gallagher: I except to the refusal of the court [816] to instruct the jury that the law did not impose upon a defendant an absolute duty of furnishing an accident-proof ventilator shaft, or that the masthouse had to be absolutely safe, to the end that it was impossible for a seaman to be injured.

The Court: I have your point.

Mr. Gallagher: I respectfully except to the refusal of the court to give the defendant's proposed

instruction to the effect that the defendant isn't guilty of actionable negligence merely because it fails to anticipate carelessness or lack of care upon the part of an employee.

The Court: Denied.

Now, Mr. Gallagher, you are going through, apparently, all of your instructions and taking time to enumerate things we have been over before.

You have gone substantially past the time and it looks as if you carry on the way you are, you are going to take the full hour that you told me you were going to take.

Mr. Gallagher: We can shorten it.

The Court: You are not going to run this courtroom. Proceed rapidly, expeditiously.

Mr. Gallagher: May I do it this way, your Honor, in an effort to conserve time: If your Honor will state that in giving the instructions, which you have given, you had in mind all of the defendant's proposed instructions, and [817] that anything which your Honor's instructions do not cover, which may be covered in the defendant's proposed, you intended to not give, then I can say, "May I have a general exception upon the ground that the court commited error in refusing to give those parts of the defendant's proposed instructions which cover matters not covered by the instructions given by the court?"

The Court: A general exception is noted.

Mr. Gallagher: That is satisfactory to your Honor?

The Court: Yes.

Mr. Gallagher: Your Honor doesn't call upon me to point out the specific defects that I claim exist?

The Court: I do not. I do feel that when you came into court this morning, after your argument was closed, and challenged the plaintiff to re-open the case and introduce certain evidence in the presence of the jury, that you did something in the presence of the jury which, if Mr. Simpson had done, you would have been screaming for mistrial here, and I think you were guilty of misconduct in that proceeding this morning.

Whether it was such I will do anything about it, I will keep under advisement until we have all had opportunity to return to tranquillity.

Wouldn't you have cited that as misconduct if Mr. Simpson had done it? [818]

Mr. Gallagher: I don't think so. I didn't challenge him——

The Court: Then you would have in that moment a character which no one would impute to you, from their knowledge of you.

Bring in the jury.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: The jury and alternate are now present.

In the course of my instructions I read you a dictionary definition of inference. Disregard the dictionary definition.

I also read you a definition of inference which I did not characterize as a dictionary definition. That was the correct definition of inference.

I am not saying whether the dictionary was correct or incorrect, but you are to regard the one from official instructing language, and in reading from Webster I departed from the official instructing language.

So I will now, in order to avoid any confusion about what an inference is, read to you the instruction of inference which I gave to you earlier and which is the proper one:

"An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a [819] deduction from those facts 'as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.'"

The cause of action which the plaintiff has charged here was read to you earlier. She is restricted to the cause of action which has been charged there, that is, you are not to go beyond the nature of negligence which was charged and seek out, to see if there was some other negligence, because she has picked out what she thought was negligence and sued upon that, and the case is restricted to that.

Now, I see that I made the same, or engaged in the same conduct with respect to the definition of presumption that I did with respect to inference, so I will look the right one up. It has been read to you before, but so you will know what part of my instruction concerning presumption is the official,

proper one, I will read the proper part to you again, and you are to disregard any other definition of presumption.

"A presumption is a deduction which the law expressly directs to be made from particular facts. It may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption."

If I told you that Mr. Hutchison was acting within the [820] performance of his duties at the time that the incident which resulted in his death took place, that was an inadvertence, for it was my intention to tell you, and I do tell you now that whether or not Mr. Hutchison was working within the scope of his employment at the time of the injury is a question exclusively for you.

I do repeat to you that it makes no difference whether he was on Articles or not on Articles.

The court instructs you also that it is the law that no employer is ever required to keep the premises in which the employees work absolutely 100 per cent accident-proof.

That is not a rule which the law requires of anyone. It doesn't require it of you or any person, that they keep things absolutely accident-proof or up to the very last minute.

Someone was showing me the other day power brakes and pointing out how much more efficient they are on a car than ordinary brakes. I don't know whether they are or not, but there was a time when automobiles had only two-wheel brakes.

Then the four-wheel brake came along, and I

suppose everyone today recognizes that the four-wheel brake is a better brake than the two-wheel.

You don't have to introduce every new thing that is known to science, but you must keep your premises within which employees are required to work, or which they will use [821] in going to or fro from work or in their reasonable access to the place of employment, you must keep those premises reasonably safe. "Reasonably" is the key word.

Now, as to exceptions to the further statement of the court to the jury, after they have returned following the statement of original exceptions, approach the bench, if there are any.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

The Court: You don't have to re-state them all over again, but just what I said, did I say anything wrong?

Mr. Simpson: No exception, your Honor.

Mr. Gallagher: The defendant has no exception to what your Honor has stated here, but does not withdraw the exceptions which it has already stated and is not satisfied with the instructions, as a whole, at this time. [822]

* * * * *

The Court: The jury will now retire to consider its verdict and I request the clerk and the bailiff to arrange to have them taken to lunch as soon as possible, because it is now almost 1:00 o'clock.

* * * * *

Friday, October 14, 1955; 10:23 p.m.

The Court: The jury present; counsel here.

I have a note from the jury.

"Re-read your instructions regarding failure to conduct a search, and that this form of negligence could apply only to the first cause of action; explain why this cannot apply to the second cause of action."

I can't re-read it, members of the jury, because that was one I didn't read in the first instance. I read most of the instructions from a book of instructions, which has been compiled by a group of judges here.

But the instruction with respect to this matter of failure to conduct a search was extemporized and I will either try that again or have the one I gave you this morning read by the reporter. Which do you prefer, Mr. Foreman, or do you have any preference?

Foreman Eager: I think we would like to have you do it, try it again.

The Court: All right.

The plaintiff claims under that first cause of action, which you will recall is really a cause of action, which if it existed, existed on behalf of Mr. Hutchison who is now deceased. [830]

Plaintiff claims that Mr. Hutchison was injured due to the negligent failure of the defendant to provide a reasonably safe place in which to work. That as a result of that the accident occurred. That Mr. Hutchison then had conscious pain and suffer-

ing, as a result of the injuries which he sustained after the accident had occurred.

Now, the evidence about failure to conduct a search was offered and admitted and should be considered for just this purpose. You have the question.

If you find that there was liability because of the failure to use reasonable care to maintain a reasonably safe place to work, you have the question then of determining what damages should be awarded. Although they would be in favor of this plaintiff, who is a representative of Mr. Hutchison's estate here, really Mr. Hutchison's damage.

Now, if Mr. Hutchison was having conscious pain and suffering you would want to know *for long* a period he had such conscious pain and suffering. And hence, the failure, if there was a failure, to search for him would be proper evidence for you to have in your mind when you consider how long that conscious pain and suffering lasted.

Now, there is the question of whether, under all the circumstances, a reasonably prudent master of a vessel would have had a search made. You will have to determine that if you come to that question. [831]

But it all goes to the problem of how long the man lived and how his pain and suffering could have been palliated or eased if he had been found by a more prompt search than the one which finally led to discovery of the body. That is how the failure to make a search enters into it.

Then there is a question, "Is it necessary that the

jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?"

It is, because the only damage that is claimed, under the first cause of action, is damage for conscious pain and suffering. There is no suit for loss of earning power under that first cause of action. There is no suit for medical expenses, or anything of that kind.

It is just a suit for the recovery of that intangible kind of damage, which results from conscious pain and suffering. And if the man Hutchison lost consciousness immediately and had no conscious pain and suffering, then no matter how much negligence you might find — and I am not saying whether you should find any or whether you shouldn't, that is for you—but regardless of how much pain and suffering there was, it is that pain and suffering that must be appraised, and that pain and suffering only, because there was no other item of damage. The man was injured. He died as a result of the injury, according to the plaintiff's [832] theory, which is for you to determine, whether it has been substantiated by the evidence. And the only thing for which you are asked to assess a money award is for the pain and suffering. That is, for the first, and unless there was conscious pain and suffering there is insufficient to establish the first cause of action.

Then we have a question, "Do interrogatories apply only to the second cause of action and not the first? If so, does it follow that contributory negli-

gence on the part of the deceased should not be considered in the verdict as to the first cause of action?"

I must answer you that contributory negligence is a question which you must have in mind and must deal with as to both causes of action.

The interrogatories, as they have been drafted here, apply to the second cause of action. You should have the same basic question in mind with respect to the first cause of action, meaning the basic question—if you find that a cause of action has been established—as to whether there was contributory negligence and if so to what extent, because even if this seaman did have conscious pain and suffering, and you find that it is possible to determine some amount of money, which would be a proper award of damages for it, if the seaman himself—meaning Mr. Hutchison—had been guilty of contributory negligence, it would be your [833] duty to diminish the amount of damages proportionately to the amount of negligence of Mr. Hutchison which contributed to bringing about the result. And you will have that principle in mind.

But so far as answering the interrogatories is concerned, they are to be answered only as to the second cause of action, in the event that you return a verdict in favor of the plaintiff on the second cause of action.

Now, these causes of action are very different, very distinct. The first one, as I told you at considerable length this morning, is actually a cause of action which has been inherited here by Mrs. Hut-

chison in her representative capacity, because Mr. Hutchison, who was the owner of that cause of action, is dead, but it is a cause of action based upon his pain and suffering, his damages suffered during his lifetime.

The second cause of action is a suit brought by a widow because of what she claims was the negligence of the defendant in having brought about the death of her husband. And that calls upon you, if you find that she has maintained her burden of proof on that, to determine what damage she has suffered; not what anyone else has suffered. Conscious pain and suffering of Mr. Hutchison doesn't enter into it at all, because that is covered by the first cause of action. [834]

The only element of damage which could be awarded under the second cause of action is the loss, if there has been a loss proved, of the expectancy of Mrs. Hutchison to have economic provision made for her by her husband, to be supported by him.

She says, "I have lost the support of my husband because the Linfield Victory did not use reasonable care to provide my husband with a reasonably safe place within which to work, and because of that I claim damages against the operators of the Linfield Victory, the damages being the amount of money, as nearly as it can be prudently calculated, that I would have received from Mr. Hutchison had he continued to live."

And in that regard you bear in mind that I read to you from the life expectancy tables, which show

that Mrs. Hutchison had a life expectancy at the time of her husband's death of 19 years; that that factor should be considered.

Don't just consider that she is going to live 19 years. She might live longer, she might live less. But the history of whatever organization, group of underwriters or health departments, or whoever it was that compiled that standard table of mortality experience, shows that the average life of persons who were the age Mrs. Hutchison was when her husband died is 19 years.

So bear in mind that fact, if you are going to find for her on the second cause of action, and always bear in [835] mind these questions of whether you do or do not find for the plaintiff are questions for you and that I am not telling you to find one way or the other.

Then you have asked that I read you the causes of action. I hope I can find them here among the papers we had this morning. I don't find them readily at hand. Can you hand me up the file?

Here they are. The first cause of action in its charging language, that is, the essence of the complaint reads this way:

"That on or about the 24th day of April, 1951, the said steamship 'Linfield Victory' was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and the performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other em-

ployees of said defendant; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 [836] lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilator shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering; that said injuries were directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances, in and about said ventilator shaft to provide a reasonably safe place in which to work."

Now, you can see from the very language of that, that it is claimed that the damages were suffered because of conscious pain and suffering, and obviously, if a seaman has personal injuries and is treated he would have the expense of treatment, but this man had no expense of treatment because he died before any was given him.

He might, if he had some permanent injury and afterward had to hobble about in a pained and dis-

abled condition, have damages that you award him a sum of money covering the period of his life expectancy; but that didn't happen. [837]

The only thing that you could possibly award on that first cause of action would be the money value, as nearly as you can assess money value, for his conscious pain and suffering.

Now, I return to reading, and I am reading you the gist of the second cause of action, which, after stating that Mrs. Hutchison was the wife of Nathanael Patrick Hutchison, and that she received the usual support that a wife receives from her husband, says:

"That as a result of said injuries, said Nathanael Patrick Hutchison died at sometime between the date of said fall, to-wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to-wit, the 30th day of April, 1951, the exact date and time of the death being to the plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent the plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages" and as a matter of law the only damage for which she could collect.

If you find that the death was caused, as it has been alleged to have been caused, if you find, as a matter of fact, it was so caused, the only damage for which she can collect is her money loss reasonably calculated to be sustained [838] by her by reason of the fact that she has been deprived of contribution to her support by her husband over what-

ever period of time you find, as reasonably prudent jurors, carefully calculating it, she has been deprived of that.

And there is only one lawsuit in which she can collect, that is, she can't come back here next year and say, "I want more." And if she dies tomorrow, and you read about it, if you have returned a verdict, you couldn't come in and take any of it away. You just have to determine what the natural expectancies are and what sum of money can be awarded today on that second cause of action.

All of this, of course, is only provided you do find that the death was caused as has been contended by the plaintiff, and the plaintiff contends that it was" * * * directly caused by reason of the negligence of said defendant, in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work."

That it negligently did that. That is the type of negligence that is alleged, not any other.

Foreman Eager: Your Honor.

The Court: Yes.

Foreman Eager: Do I understand you correctly by that last remark, that where you have referred to the type of negligence that is alleged in the second cause of action, [839] that the negligence and failure to conduct a search was not alleged in the second cause of action?

The Court: That is true. You see, it couldn't

enter into the second cause of action because, in any event, the woman has lost a husband.

Now, when he died if he did not die because of negligence she has no claim. If he did not die because of the particular kind of negligence charged here she has no claim upon this defendant. But if he did die because of the particular negligence, which has been charged here, then her right accrued the moment he died.

And it wouldn't make any difference whether he was immediately discovered, whether his body was immediately discovered or whether it wasn't. It wouldn't have made any difference if they had seen him fall and had immediately taken him to a hospital, and he had had the best of care and comfort and was given sedatives so that he didn't suffer at all. But, nonetheless, he died.

Her cause of action is based upon the fact that she has lost the support of that husband due to the negligence of the defendant, meaning the particular kind of negligence which has been charged here.

And that doesn't include the making of a search for him, but it does include, of course, and is based upon his death under the circumstances which she has claimed brought [840] that death about.

So whether a search was made or not has nothing to do with the second cause of action. It might have something to do with the first cause of action; that is up to you.

Now, you asked something else, one more question here, as I read these:

"Some jurors recall that someone testified that

they had observed screens on the ventilator shafts of other Victory ships. Do you recall any such testimony?"

Well, it is not whether I recall it individually, but whether there was such testimony, and the court, fortunately, has an official recollection which is better than either mine or yours.

I wonder, can counsel indicate the testimony of any particular witness who testified upon this particular subject?

Mr. Simpson: Yes, your Honor. The witness Amundsen so testified.

Mr. Gallagher: I would like to have counsel read it from the deposition as we read it, where he said that he had seen screens on other Victory ships. That was the question. Not other ships, but other Victory ships. I don't think he mentioned Victory ships in that answer. I didn't bring my file.

The Court: The testimony actually should be read from our reporter's notes. But do I take it, Mr. Gallagher, [841] that you are suggesting that for convenience it be read from the deposition?

Mr. Gallagher: Let us look it over together.

The Court: All right.

Mr. Gallagher: Make sure that he is only reading only parts that were read into the record.

Mr. Simpson: May I ask——

Mr. Gallagher: Or have the reporter read it.

Mr. Simpson: May I ask the question be re-read, so there will be no misleading in any way?

The Court: I will pass all of these questions down to the clerk, who will hand them to counsel.

If, with respect to any of the questions, I have not answered them fully or with clarity, if you will indicate wherein I can improve it, I will try to do so, but if you made any such indication, let's do that at the side.

Mr. Simpson: The reason I asked for the question is it says "on the shafts of other" and it is underlined Victory ships.

The particular portion to which I referred, in starting to answer this, to my knowledge there is no testimony that they were seen on other Victory ships.

The Court: It was on other ships?

Mr. Simpson: That is correct.

Mr. Gallagher: I would like to see those questions, too. [842]

The Court: They have been passed to Mr. Gallagher.

The foreman has his hand up.

Foreman Eager: Your Honor, I feel sure that some jurors still feel that they should be permitted to consider the matter of negligence in not conducting a search, in connection with the cause of action, the second cause of action. If you wish, I can tell you why.

The Court: It would be unlawful for you to tell me why. We are a court of law, so we have to live by it.

Foreman Eager: Will you tell us, is it because it was not set forth in the complaint, is that the reason we cannot consider it?

The Court: No. No, that is not the reason. The

reason is that the law just does not allow damages for failure to make the search, that is, it does not allow damages to the widow.

Of course, there might conceivably be some situations in human affairs where there would be such a cause of action, but this is not that kind of a suit.

This is a suit brought by a woman who says, "I was the dependent wife or partially dependent wife of a man who had been killed due to particular negligence of the defendant."

And if she is right in that, then she is entitled to be compensated for her money loss. The law is very hard on all matters. It takes the view that a money loss is what is [843] compensated in courts and money loss is what she suffered.

You will note that I have not said that you could consider the loss of society of the husband. That is not an element on this type of damage. It is the financial loss to the lady.

Mr. Simpson: Your Honor, could counsel approach the bench for just a moment?

The Court: Yes.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Simpson: Your Honor, while I believe this particular foreman is expressing as the question of the jury, what it has in mind is the fact that the plaintiff did incorporate Paragraph IX, failure to search, as part of the second cause of action.

The Court: The foreman can't know that because we didn't read the complaint to them.

Mr. Simpson: I was about to add he doesn't know that was in there, but the reason the plaintiff had included it was because of the idea, among other things, but for the failure to search this man might have been found and there would have been the thought that his life would have been saved. And I believe they are thinking the same way, this would constitute part of the negligence of the pecuniary loss. [844]

The Court: That is a factual question, isn't it, Mr. Gallagher?

Mr. Gallagher: I don't believe so. I think the jury, by the questions, has indicated that it will find for the defendant on the question of the allegation which the plaintiff has made, to the effect that there was a negligent failure to supply sufficient safety appliances in and about the ventilator shaft, to provide a reasonably safe place to work.

What they are trying to do is to find out whether, even with that finding, they could render a verdict in favor of the plaintiff on this failure to search theory.

Now, I say to this your Honor, and I hope I am not offending your Honor this evening: If that is a cause of action it is a separate and distinct cause of action, as to which your Honor would have to submit separate verdicts and split it up into three causes of action, because it would be extremely unfair to permit this jury to render an opaque verdict on that second cause of action for damages, when these questions indicate what they would like to do

is to find out whether, on the death cause of action, they can base it on a failure to search.

Now, the reason, I contend, that your Honor is required under the law to submit that as a separate and distinct verdict form is that unless you do that you can't tell what they found on the specific allegations in Paragraph VIII, [845] and nobody else can.

Now, nobody is asking for anything that is unfair. The defendant doesn't want the court to be partial to the defendant. But the defendant does want the court to do whatever should be done to make the verdict of the jury understandable.

I think your Honor can see what I am talking about. I called that to your Honor's attention the other day. I said that if there are three causes of action you have to have three separate forms of verdict and make them distinct. A verdict labeled "Search cause of action"——

The Court: The Complaint did not start out—that is, if we start with the complaint we don't see three separate causes of action, do we?

Mr. Gallagher: Your Honor, if there is a cause of action which can be predicated upon the failure to search and a failure to find, it is entirely separate and distinct from the cause of action based upon a failure to supply safety appliances, because the injuries were sustained when the man hit the bottom of the trunk, and I think your Honor will recall I cited the case of Hunt v. The Union Oil Company, 111 Fed. (2d), to convince your Honor that a cause of action for aggravation of existing

injuries is separate and distinct from the cause of action for the existing injuries; this is the same thing.

The Court: I think cases are abundant on that. [846]

Mr. Gallagher: I think what your Honor ought to do, if you believe that is a factual question, so far as the cause of action for death is concerned, your Honor submit some special interrogatories to them or you should submit another form of verdict to them, and tell them that they have got to find in favor of the defendant on the alleged neglect to supply sufficient safety appliances, if they find the burden of proof has failed in that, so their verdict will not be opaque and unfair and unintelligible.

The Court: Let me read the interrogatories.

I think, Mr. Simpson, you are limited here in your second cause of action.

You say that as a result of said injuries that Nathanael Patrick Hutchison dies. You didn't allege he died because he was not found seasonably.

Mr. Simpson: If you recall, we allege——

The Court: I just had those charging paragraphs excised from it for my convenience here at the bench.

Mr. Simpson: The paragraph which is incorporated by reference as the first paragraph of the second cause of action——

The Court: We will get it. My problem, as I mentioned it there, or the problem, rather, is that the second cause of action says, "said injuries" and

"said injuries" are always referred to as emanating from the inadequacy of [847] the safety devices.

Your Paragraph IX says:

"That defendant and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall," but it doesn't then go on and allege there was any damage as a result of that.

It is thrown in, so far as reading the complaint is concerned, as kind of a gratuitous observation that they were a callous employer, but without any drawing of a damage——

Mr. Simpson: Isn't the fall, your Honor, in the category of the damage, referring to "said injuries", injuries of the fall?

The Court: I don't follow you.

Mr. Simpson: If a man falls, as alleged in Paragraph VIII, and we incorporate, when we take up our first paragraph in our second cause of action, that if the fall was part of the injury the very fact that he fell——

The Court: It is not alleged any damages flowed from the failure to find him.

Mr. Simpson: Well, excepting his death, which is alleged, because they refer to "said injuries".

Our whole reason for incorporating that [848] paragraph in the second cause of action was that we believed that the failure to conduct a search—had it been conducted there might have been a saving of the man's life, and there would be no cause

of action on the first one, and this was a violation of their duty, the agent, as not only to the safety appliances, within the scope of the Jones Act——

The Court: I don't think you could sustain a judgment on that, not in this state of the pleading. I am sorry, I would like to give that instruction. I don't think the pleadings would warrant it.

Mr. Simpson: My whole point, your Honor, is that I feel, in finding that this widow suffers a pecuniary loss because of his death, they must first find there was negligent conduct on the part of the defendant, and but for that this wouldn't have happened.

The Court: That is right.

Mr. Simpson: We do allege that they did not search. The jury have at least considered that within the framework of the negligence that led to the death.

The Court: You didn't allege there was a bit of aggravation because they didn't find him. You just allege that they didn't search for him.

Mr. Gallagher: Your Honor, may I point out, that under the Federal Rules of Civil Procedure, while it is permissible to say "first cause of action, second cause of action" and [849] so forth, there are cases which hold that if you set forth separate claims in separate paragraphs that is all that is required.

Of course, you have got to allege a fact showing some proximate causal connection between what you do allege and what you do claim.

Assuming, without conceding, there are inferred

facts sufficient to show plaintiff is entitled to relief on the theory that this was a negligent failure to search for him, and that such negligent failure proximately contributed to his death. That would be separate and distinct entirely from the cause of action which is predicated upon the condition of the masthouse appliances.

Therefore, as I have contended and do now contend, if the court submits that theory to the jury, which I don't think the court should, the court must submit separate forms of verdict and have them labeled so we will know what the jury has done. Otherwise, the defendant would be deprived of its property without due process of law, in that there is no finding with reference to that particular alleged cause of action.

Mr. Simpson claims there are three separate causes of action. That is what he claims.

The Court: He hasn't alleged three. I cannot give the instruction that he requests or submit an interrogatory— [850] if I submit an interrogatory on that and the jury returned it, you could appeal on the ground that it is not the cause of action that is pleaded in the amended complaint, and I think you would be sustained on it.

Mr. Gallagher: Well, your Honor said something about these instructions that you have given the jury since they came back.

The defendant excepts to the instructions which your Honor has given to the jury since they came down this evening upon the ground that these instructions given to the jury are argumentative. They

are not confined to the statement of principles of law applicable to the case.

They do not cover the issues which the court purported to state to the jury. The court refers to negligence and so forth and so on, but they are, I think, unfair to the defendant.

The court keeps constantly referring to the fact that this poor widow has lost her husband and she has sustained a monetary loss, and so forth and so on.

Now, I call your Honor's attention—oh, and in reading averments of the complaint, I again request your Honor to tell the jury unequivocally that the averments of the complaint do not constitute facts and do not constitute any evidence in this case.

And this question—— [851]

The Court: Before I forget, I will tell them that.

Mr. Gallagher: ——had not been answered.

(Whereupon, the following proceedings were had in the presence and the hearing of the jury:)

The Court: Members of the jury, I have read a portion of the complaint to you. A complaint is not evidence. It is the allegation. The evidence is what you heard from the witness stand, what you have seen in the exhibits.

The complaint merely states the charge that the plaintiff has made against the defendant. It is the pleading and not the proof.

(Whereupon, the following proceedings were

had in the presence but out of the hearing of the jury:)

Mr. Gallagher: Now, this question reads as follows:

"Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?"

Now, I respectfully submit that that question should be answered categorically. The answer is either yes or no.

The question should be read to the jury and the answer given. I think the only possible answer that you should give to that interrogatory is yes. And they should be instructed to disregard what you have said.

The Court: I will not instruct them to [852] disregard anything I have said. It has all been the law.

(Whereupon, the following proceedings were had in the presence and the hearing of the jury:)

The Court: One of your questions to me reads:

"Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?"

The answer is yes.

Now, members of the jury, have we answered the questions you had in mind?

Foreman Eager: Yes, sir.

The Court: It is after 11:00 o'clock. Do you want to work further on the case tonight or not?

I see some of you nodding affirmatively. We don't want to make you work when you are fatigued.

We will send you to a hotel if you desire. You can resume deliberations——

Foreman Eager: I think we would like to work for a little while.

The Court: All right. You may retire to the jury room to further consider your verdict. But, if, in the course of the deliberations, you come to the point where you wish the court to have you sent to a hotel for the night, bear in mind I will do so as soon as you let me know. [853]

Foreman Eager: If we should make a decision on one cause of action and not the other, would you like to know that tonight or would you like to have us hold that until——

The Court: I think we should have the entire verdict at one time.

Foreman Eager: Thank you.

The Court: Recess until we hear from the jury further.

(Whereupon, at 11:12 p.m. the jury retired to deliberate further.) [854]

October 15, 1955, 12:04 a.m.

The Court: Have you arrived at a verdict?

Foreman Eager: Yes, your Honor.

The Court: Have you signed it?

Foreman Eager: Yes, your Honor.

The Court: Dated it?

Foreman Eager: Yes, your Honor.

The Court: What date did you put on it?

Foreman Eager: Yesterday, the 14th.

The Court: Put today's date on it. That is important. It will make it accurate and also, since you had to work into another day, you are entitled to another day's honorarium for your services here. You can't get it if you back-date the verdict.

You may now read the verdict.

Foreman Eager: Shall I read the interrogatories or the just the verdict.

The Court: Read the verdict and then the interrogatories after the verdict.

Foreman Eager: All of it, your Honor?

The Court: I am sorry, yes. It is the jury's verdict and the jury should speak it.

Foreman Eager: "First Cause of Action"—shall I read the number? [855]

The Court: No, you can just get into the body of it. You don't have to read the title or the number.

Foreman Eager: "(Personal Injuries)

"Upon the first cause of action, we the jury find in favor of the defendant, Pacific-Atlantic Steamship Company, and against the plaintiff, Emma Hutchison, administratrix of the estate of Nathanael Patrick Hutchison, deceased. Signed William H. Eager, Foreman of the Jury. Dated at Los Angeles, California this 15th day of October, 1955.

"Second Cause of Action (Damages for Death)

"Upon the second cause of action, we the jury find in favor of the plaintiff, Emma Hutchison, administratrix of the estate of Nathanael Patrick Hutchison, deceased, and against the defendant, Pacific-

Atlantic Steamship Company, and fix plaintiff's damages in the sum of: $45,000.00. William H. Eager, Foreman of the Jury. Dated this 15th day of October, 1955.

"Interrogatory No. 1: "What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison?

$50,000.00.

"Interrogatory No. 2: [856] "Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?

"Yes.

"Interrogatory No. 3: "If your answer to Interrogatory No. 2 is 'yes', state the extent in percentage that the negligence of Nathanael Patrick Hutchison proximately contributed to his death.

"Ten per cent.

"B Translate the percentage into dollars as a percentage of the amount given by you in answer to Interrogatory No. 1. What is the amount thus computed?

"5,000.00.

"Interrogatory No. 4: "Subject the amount of money stated by you in answer to Interrogatory No. 3 B from the amount of money stated by you in your answer to Interrogatory No. 1. What is the result of this computation?

"$45,000.00.

"The handwritten portion of the foregoing constitute answers made by the jury to the typewritten portion which are interrogatories submitted to the jury for its answers. [857]

"Dated: October 15th, 1955. Signed William H. Eager,

Foreman of the Jury."

The Court: Thank you. Will you hand those verdicts to the bailiff, who will give them to the clerk.

The clerk will call the roll of the jury. Will one overall poll be sufficient, or do you wish a poll as to each verdict and each interrogatory?

Mr. Gallagher: I think one will be sufficient.

The Court: All right. One poll.

These will be the last questions we will ask you.

The Clerk: Mr. Metzler, is this your verdict as presented and read?

Juror Metzler: It is.

The Clerk: Mrs. Korengold, is this your verdict as presented and read?

Juror Korengold: It is.

The Clerk: Mr. Eager, is this your verdict as presented and read?

Foreman Eager: It is.

The Clerk: Mr. Clark, is this your verdict as presented and read?

Juror Clark: It is.

The Clerk: Mrs. Sealfon, is this your verdict as presented and read?

Juror Sealfon: It is. [858]

The Clerk: Miss Jeffreys, is this your verdict as presented and read?

Juror Jeffreys: It is.

The Clerk: Mrs. Booth, is this your verdict as presented and read?

Juror Booth: It is.

The Clerk: Mr. Duber, is this your verdict as presented and read?

Juror Duber: It is.

The Clerk: Mrs. Bannister, is this your verdict as presented and read?

Juror Bannister: It is.

The Clerk: Mrs. De Young, is this your verdict as presented and read?

Juror De Young: It is.

The Clerk: Mrs. Schindler, is this your verdict as presented and read?

Juror Schindler: It is.

The Clerk: Mr. Curran, is this your verdict as presented and read?

Juror Curran: It is.

The Court: Enter the verdicts, and enter judgment upon the verdicts.

* * * * *

[Endorsed]: Filed February 27, 1956.

[Endorsed]: No. 15091. United States Court of Appeals for the Ninth Circuit. Pacific-Atlantic Steamship Company, a corporation, Appellant, vs. Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 9, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15091

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation, Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, Appellee.

STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY

1. The court erred in denying defendant's written motion to strike the matter contained in Paragraph IX of the First Amended Complaint; said written motion having been filed in October, 1952; and erred in denying defendant's oral motions, during the course of the last trial, to strike said matter.

2. The court erred in denying defendant's motion for a directed verdict with respect to the matter set forth in Paragraph IX "That defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to-wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the Port of Philadelphia, State of Pennsylvania."

3. The court erred in permitting the plaintiff to

introduce irrelevant, immaterial, impertinent, and passion and prejudice arousing evidence upon the subject of defendant's failure to search for and discover Hutchison at the bottom of said ventilating shaft in an injured condition prior to his death.

4. The court erred in denying defendant's oral motions to withdraw the subject of defendant's failure to search for and discover Nathanael P. Hutchison in an injured condition and prior to his death from the consideration of the jury.

5. The court erred in denying defendant's motion for a directed verdict, at the close of the evidence offered by the plaintiff, with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

6. The court erred in each and every ruling, order, decision or action adverse to the defendant, appearing within and shown by the matters and things included within defendant's designation of the record on appeal; and in this respect, defendant will contend on appeal that none of said rulings, orders, decisions or actions was invited, encouraged, or waived or consented to at any time or in any manner whatsoever or at all, by reason of any act or omission of defendant.

7. The court erred in denying defendant's motion, at the close of all of the evidence, for a directed verdict in favor of defendant with respect to the claim or count designated as the "Second Cause of Action" in the first amended complaint.

8. The court erred in denying defendant's mo-

tion for judgment notwithstanding the verdict with respect to the claim designated in the first amended complaint as the "Second Cause of Action"; and in its ruling denying defendant's alternative motion for a new trial with respect thereto; and there was an abuse of judicial discretion in the ruling of the court with respect to said alternative motion for a new trial.

9. The court erred in refusing to give to the defendant reasonable time and opportunity to assign as error the giving and the failure to give instructions in that defendant's attorney was arbitrarily denied a reasonably sufficient time and opportunity to state distinctly the matter to which the defendant objected and the grounds of its objections.

10. The evidence is insufficient to support the finding of the jury that at the time Nathanael P. Hutchison suffered the personal injuries from which he died the said Hutchison was acting or engaged in the course of his employment.

11. The evidence is insufficient to support a finding that there was an insufficiency in the appliances in and about the ventilator shaft referred to in Paragraph VIII of the first amended complaint or that, in this respect, there was a failure on the part of the defendant to provide a reasonably safe place in which to work.

12. The evidence is insufficient to support a finding that there was an insufficiency, due to defendant's negligence, in its safety appliances in and

about the ventilator shaft or that, in this respect, there was a negligent failure on the part of the defendant to provide a reasonably safe place in which to work.

13. The evidence is insufficient to support findings in favor of the plaintiff with respect to the issues of material fact raised by those averments set forth in Paragraphs VII, VIII and/or IX of the claim designated in the first amended complaint as "First Cause of Action" and incorporated by reference thereto in the "Second Cause of Action" and the averments of Paragraph II of said "Second Cause of Action" which are denied in defendant's answer.

14. The evidence is insufficient to support a finding that Nathanael P. Hutchison fell into or was precipitated to the bottom of said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

15. The evidence is insufficient to support a finding that said ventilator shaft was an open ventilator shaft.

16. The evidence fails to show actionable negligence on the part of defendant as averred in the first amended complaint.

17. The jury erroneously failed to find that negligence on the part of Nathanael P. Hutchison was the sole proximate cause of his death.

18. The evidence is insufficient to support the finding of the jury that negligence on the part of Nathanael P. Hutchison did not proximately con-

tribute to his death to any extent or proportion in excess of 10 percent of the total proximate cause of said death.

19. The evidence is insufficient to support the finding of the jury that plaintiff suffered damage in the sum of Fifty Thousand Dollars ($50,000.00).

20. There was irregularity in the proceedings, acts and conduct of the court, jury and plaintiff's trial attorney; and orders of the court and abuse of judicial discretion, by which the defendant was prevented from having a fair trial.

21. Excessive damages were awarded under the influence of passion and prejudice and arbitrary conduct upon the part of the jury.

22. The court erred in admitting into evidence the testimony of Amundsen with respect to screens over the top of ventilator shafts on other ships, horizontal bars precluding entry into the access shaft adjacent to said ventilator shaft on other ships; that he had never seen on any other ship a ventilator shaft without a ladder therein; and those portions of the testimony of Castle that there was no protective screen over the top of the ventilator shaft and that with the door to the masthouse closed it was quite dark inside said masthouse; and the testimony of John Hutchison (brother of the deceased) that with the masthouse door closed there was absolute darkness inside said masthouse; and the testimony and conclusions of Crawford with respect to the subjects of custom or practice, and thorough illumination of all areas of

work; and with respect to heavy vertical screens in place of the pipe railings; that the ventilator shaft was a dangerous area; and that said ventilator shaft was adjacent to an area of access.

23. The court erred in refusing to grant defendant's motions, and each thereof, to strike testimony and other evidence with respect to the issue of actionable negligence upon the grounds stated in such motions, and each thereof, and in accordance with such motions, and each thereof.

24. The court erred in instructing the jury as it did and in failing to instruct the jury in a distinct, concise, direct and impartial manner with respect to the law applicable to the issues of material fact raised by those averments of the first amended complaint which were denied by defendant in its answer thereto; and with respect to defendant's special defense premised upon negligence on the part of Nathanael P. Hutchison proximately causing or proximately contributing to his injury or death.

25. The court erred in refusing to instruct the jury upon the essential elements of actionable negligence on the part of defendant in connection with and as limited by the averments of the first amended complaint with respect to the claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; and in the failure and refusal of the court to restrict and confine the possibility of a

verdict against the defendant exclusively to said specific and only claim of alleged negligence on the part of defendant.

26. The court erred in failing and refusing in the instructions given to the jury to fairly, distinctly and accurately state and define the issues of material fact raised by those averments of the first amended complaint denied in the answer of the defendant, or to confine the fact finding power of the jury thereto.

27. The instructions as a whole are misleading, contradictory, confusing, inaccurate, incomplete and lack distinctness. The instructions as a whole contain indiscriminate, improper, extraneous and erroneous statements and comments by the trial judge.

28. The instructions as a whole contain inaccurate, irrelevant and improper interpolations by the trial judge having no legitimate bases in the law applicable to the issues or evidence and not necessary for the proper guidance of the jury in its deliberations.

29. There was an erroneous failure of the court in the instructions given to the jury of its own motion to fairly or completely or at all to state or define the issues of material fact raised by the averments of the first amended complaint and the denials thereof in defendant's answer thereto; an erroneous failure of the court to instruct the jury with respect to the sole statutory basis of possible liability on the part of the defendant as to plain-

tiff's claim for damages by reason of the death of Nathanael P. Hutchison; an erroneous failure of the court to instruct the jury with respect to the essential elements of actionable negligence on the part of the defendant in connection with and as limited by the averments of a claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; an erroneous failure of the court to properly instruct with respect to the burden of proof imposed upon the plaintiff and defendant or to fully instruct thereon; an erroneous refusal of the court to properly or adequately instruct the jury with respect to the duties imposed by law upon the defendant and Nathanael P. Hutchison with respect to the subjects of actionable negligence on the part of the defendant, contributory negligence on the part of Nathanael P. Hutchison, and negligence on the part of the latter as a sole proximate cause of his injuries and death; the instructions given to the jury by the court of its own motion are indistinct, incomplete, inadequate, inaccurate and unfair to the defendant and do not cover the law applicable to legal liability imposed by the Jones Act, the issues of material fact raised by the pleadings or the competent, relevant and material evidence introduced by the respective parties; the instructions given by the court of its own motion contain much matter and improper comment which is completely extraneous to proper statements of law which can be given

to a jury as the law applicable to the issues and evidence in the case at bar; the court in its instructions interpolated and made improper, unfair and inaccurate comments with respect to the effect and weight of evidence; the elements of actionable negligence on the part of defendant; contributory negligence on the part of Nathanael P. Hutchison; the subject of damages and other matters; the court improperly instructed and commented with respect to disputed questions of fact and also gave contradictory instructions thereon; the court improperly refused to give correct instructions upon the applicable principles of law as requested by the defendant or to give, in lieu thereof, those portions of defendant's proposed instructions which are not covered in substance or at all in the instructions actually given to the jury; and in particular, the court improperly refused to give or to otherwise correctly or adequately cover applicable principles of law contained in the following instructions proposed by the defendant and delivered to the court on or before October 12, 1955: Numbers 1, 5, 6, 10, 11, 11A, 12, 13, 14, 14A, 15, 15A, 16, 16A, 17, 18, 19, 19A, 23, 24, 25, 28, 29, 30, 30A, 31, 31A, 32, 32A, 33, 34, 35, 35A, 36, 36A, 38, 39, 40, 40A, 41, 42, 43, 44A, 45, 45A, 47, 49, 51, 52, 53, 54, 55, 55A, 56, 57, 57A, 58, 58A, 59, 60, 65, and 66.

30. The court improperly refused to submit to the jury and require an answer to defendant's proposed interrogatory No. 3, which reads as follows: "On what date and at what time on said date did

Nathanael P. Hutchison come in contact with the bottom of the ventilator shaft?"

Dated: April 9, 1956.

/s/ LASHER B. GALLAGHER,
Attorney for Appellant Pacific-Atlantic Steamship Co., a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 9, 1956. Paul P. O'Brien, Clerk.